Supreme Court, U.S.
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No. 03-

IN THE

# Supreme Court of the United States

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,
*Petitioner*,

*v.*

ELEANOR HEALD, *et al.*
*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Section 2 of the Twenty-first Amendment of the United States Constitution prohibits importation of alcoholic beverages into any state, for delivery or use therein, in violation of the laws thereof. In the Webb-Kenyon Act, 27 U.S.C. § 122, Congress exercised its power under the Commerce Clause to impose essentially the same prohibition by federal statute.

Michigan, like many other states, generally prohibits the importation of alcoholic beverages by any unlicensed person. Michigan law permits licensed in-state wineries to ship wine directly to consumers, but does not, as a matter of right, permit out-of-state wineries (which are not licensed by the state) to do so. An out-of-state entity may locate in Michigan and be licensed as an in-state winery. The Sixth Circuit ruled that the Michigan statute is "facially discriminatory" and struck down the prohibition on importation, allowing Michigan consumers to order and receive wine from out-of-state sources without limitation. The questions presented are:

1. Whether the Sixth Circuit erred in ruling (in conflict with a Seventh Circuit decision upholding a similar Indiana statute against the same challenge) that the Twenty-first Amendment and the Webb-Kenyon Act do not authorize Michigan to enact statutes that prohibit the importation of alcoholic beverages by unlicensed persons, and that the Commerce Clause bars such statutes.

2. Whether the Sixth Circuit erred in ruling (in conflict with a Fourth Circuit decision with respect to a similar North Carolina statute) that the proper remedy for the alleged discrimination was to invalidate the state's control over importation of alcoholic beverages rather than merely strike the offending exception for in-state wineries.

## LIST OF PARTIES

Petitioner, intervening defendant-appellee below, is the Michigan Beer & Wine Wholesalers Association ("MB&WWA"), a trade association of Michigan beer and wine wholesalers that intervened as a defendant in the district court.

Respondents, defendants-appellees below, are State of Michigan officials including the Governor, the Michigan Attorney General, and the Chair of the Liquor Control Commission (hereafter collectively referred to as "Michigan" or the "State"). The current holders of those offices have been substituted as parties for the former office holders pursuant to Supreme Court Rule 35.3.

Respondents, plaintiffs-appellants below, include Eleanor Heald, Ray Heald, John Arundel, Karen Brown, Richard Brown, Bonnie McMinn, Gregory Stein, Michelle Morlan, William Horwath, Margaret Christina, Robert Christina, Trisha Hopkins, Jim Hopkins, and Domaine Alfred, Inc. (hereafter collectively referred to as "plaintiffs"). The thirteen individual parties are Michigan residents who are wine consumers or wine journalists. Respondent Domaine Alfred, Inc. is a California winery.

## RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner MB&WWA has no parent corporation, and there is no publicly held company that owns 10% or more of its stock.

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

## PETITION FOR A WRIT OF CERTIORARI

The Michigan Beer & Wine Wholesalers Association ("MB&WWA") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App. 1a-18a) is reported at 342 F.3d 517. The order denying rehearing *en banc* (App. 21a-22a) is not reported. The opinion of the district court granting summary judgment for the defendants (App. 25a-35a) is not reported. The order of the district court denying reconsideration (App. 39a-40a) is not reported.

## JURISDICTION

The judgment of the court of appeals was entered on August 28, 2003, and rehearing *en banc* was denied on November 4, 2003. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Commerce Clause, U.S. Const. art. I, § 8, cl. 3 (App. 45a); the Twenty-first Amendment, U.S. Const. amend. XXI (App. 45a); the Webb-Kenyon Act, 27 U.S.C. § 122 (1935) (App. 46a); Mich. Comp. Laws §§ 436.1111, 436.1113(9), 436.1203, 436.1537, 436.1701, 436.1801, 436.1903, and 436.1909 (App. 47a-66a); and Mich. Admin. Code R. 436.1515, 436.1705(2)(d), and 436.1719(5) (App. 67a-69a).

## STATEMENT

The Sixth Circuit has authorized Michigan consumers and out-of-state wineries to do exactly what the Twenty-first Amendment and the Webb-Kenyon Act, 27 U.S.C. § 122, expressly forbid: import alcoholic beverages into Michigan, for use by Michigan consumers, in violation of Michigan law. *See* U.S. Const. amend. XXI, § 2 ("The transportation or importation into any State ... for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."); 27 U.S.C. § 122 ("The shipment or transportation ... of any ... vinous ... intoxicating liquor ... from one State ... into any other State ... in violation of any law of such State ... is prohibited."). The Sixth Circuit dismissed as outmoded the consistent decisions of this Court holding that state authority over the physical importation of alcoholic beverages is virtually plenary. The decision below conflicts with a decision of the Seventh Circuit upholding a similar Indiana statute against the same challenge; a decision of the Eleventh Circuit rejecting "strict scrutiny" of such provisions; and a decision of the Fourth Circuit finding a similar North Carolina statute discriminatory but invalidating only the exception for licensed in-state wineries, not the state's power to control importation of wine. This case raises issues that have now been inconsistently addressed by five federal circuits and are implicated by the statutory schemes of numerous states, as evidenced by the fact that at least twelve state statutory schemes have already been challenged in similar lawsuits.

Individual Michigan residents sued Michigan's Governor, its Attorney General, and the Chair of its Liquor Control Commission (collectively, "Michigan" or the "State"), seeking both a declaration that Michigan statutory and regulatory provisions barring the shipment of wine into Michigan for delivery to any person other than a licensed wholesaler violate the "dormant Commerce Clause," and an injunction against the enforcement of the provisions. *See* Mich. Comp. Laws §§ 436.1113(9), 436.1203, 436.1909; Mich. Admin. Code R. 436.1515, 436.1705(2)(d), 436.1719(5). Two non-Michigan wineries (one of which was ultimately dismissed from the case) were added as plaintiffs, and petitioner MB&WWA, a trade association of licensed Michigan beer and wine wholesalers, intervened as a defendant.

On cross motions for summary judgment, the district court rejected respondents' challenge, holding that the statutory scheme is a permitted exercise of state power under the Twenty-first Amendment. App. 34a. The district court stated that the Michigan Legislature required imports to pass through Michigan licensees as a means to reduce the opportunities for alcoholic beverages to fall into the hands of minors and in order to assure the collection of state taxes. *Id.* at 34a-35a. It noted that out-of-state wineries are not barred from selling their products in Michigan but are merely required to do so through state-licensed wholesalers, and it rejected the contention that allowing direct shipment to consumers by licensed in-state wineries, which are physically present in the state, constitutes unconstitutional discrimination.[1]

On appeal, the Sixth Circuit reversed and remanded with instructions to grant summary judgment to the plaintiffs. The effect of doing so will be to enjoin enforcement of Michigan's statutory scheme for importation and delivery of

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[1] Licensed wholesalers must sell the imported wine to licensed retailers who are authorized to sell directly to consumers; thus all wines—whether produced in-state or out-of-state—can be sold to Michigan consumers only by licensed entities authorized to make such sales.

alcoholic beverages. The Sixth Circuit ruled that the provision allowing licensed in-state wineries to ship directly to consumers rendered Michigan's regulatory scheme "facially discriminatory" and subject to "strict scrutiny" under the dormant Commerce Clause. App. 17a. Finding that the "facial discrimination" violated that Clause, the court then turned briefly to the Twenty-first Amendment. *Id.* at 14a-15a. It ruled that Michigan's "discrimination between in-state and out-of-state wineries [does not] further[] any of the [Twenty-first Amendment's] concerns[:]," "promoting temperance, ensuring orderly market conditions, and raising revenue," (*id.* at 14a), and it concluded that the Twenty-first Amendment had no legal relevance to the case. The court did not respond to the argument of petitioner and Michigan that the Commerce Clause is not "dormant" under these circumstances, because in the Webb-Kenyon Act, Congress used its Commerce Clause power to give the states federal statutory authority, in addition to their constitutional authority, to restrict imports of alcoholic beverages.

In reaching its conclusion, the Sixth Circuit rejected a series of decisions of this Court (including, most recently, *North Dakota* v. *United States*, 495 U.S. 423 (1990)), that hold that states have virtually plenary power to regulate the physical importation of alcohol for use by their citizens. The Sixth Circuit considered this line of decisions as essentially jettisoned by this Court's decisions in *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964), which dealt with alcoholic beverages traveling in bond through (but not destined for use in) New York, and *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984), which dealt not with importation provisions but with a discriminatory taxation scheme that the state (Hawaii) made no serious effort to defend under the Twenty-first Amendment.

The Sixth Circuit disagreed explicitly with the Seventh Circuit's ruling in *Bridenbaugh* v. *Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000) (Easterbrook, J.), which upheld a similar Indiana statute against the same challenge. In contrast to the analysis in *Bridenbaugh*, the Sixth Circuit ruled

that Michigan must justify as "needed" and "least restrictive" its decision to allow only licensed in-state wineries to ship directly to consumers, and held that the State did not meet this burden. App. 12a, 17a. The Sixth Circuit reversed the district court's grant of summary judgment in Michigan's favor, and remanded with instructions to grant summary judgment to the plaintiffs, effectively granting the plaintiffs the relief requested.

The relief plaintiffs sought consists of a declaration of unconstitutionality and an injunction against the enforcement of Michigan's prohibition of importation by unlicensed persons. In granting such relief, the Sixth Circuit eviscerated Michigan's ability to regulate importation of alcoholic beverages, even though the constitutional problem the court found lay in a provision authorizing licensed in-state wineries to ship wine to consumers—an exception inserted into the statutory scheme long after the statutory bar on unlicensed importation (which has existed since the repeal of Prohibition).[2] The effect of the Sixth Circuit's decision is to

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[2] In Michigan, a person holding the appropriate retail license can ship alcoholic beverages (including not only wines made in Michigan but equally wines imported into Michigan) to Michigan consumers subject to strict regulations to insure that alcoholic beverages do not fall into the hands of persons under 21 years of age and that taxes are paid. *See, e.g.*, Mich. Comp. Laws § 436.1111(5), (12); *id.* § 436.1203(2), (3), (4), (8). Because Michigan defines "wine maker" as a person licensed to sell "at wholesale or retail, wine manufactured by that person", a licensed "wine maker" has the ability to ship wines it manufactures to Michigan consumers. *See* Mich. Comp. Laws § 436.1113(9). Any qualified out-of-state manufacturer may establish a physical presence in Michigan and be licensed in Michigan as a wine maker. Any Michigan alcoholic beverage licensee who violates Michigan's laws and regulations governing importation, distribution or sale of alcoholic beverages is subject to license suspension or revocation and/or criminal penalties. *See, e.g.*, Mich. Comp. Laws §§ 436.1701, 436.1909. Plaintiffs' complaint sought to have Mich. Comp. Laws §§ 436.1203 and 436.1909 declared unconstitutional under the dormant Commerce Clause and enforcement of those statutes enjoined, with the effect that any out-of-state winery or retailer could directly ship wine to Michigan consumers outside of Michigan's licensed distribution scheme.

substitute its opinion for that of Michigan's legislature and to leave importation of alcoholic beverages entirely unregulated—free of state control or criminal penalties.

Petitioner and Michigan both filed petitions for rehearing *en banc*, seeking modification of both the constitutional ruling and the remedial ruling. The Sixth Circuit rejected those petitions without comment.

## REASONS FOR GRANTING THE PETITION

The Sixth Circuit's decision results in import alcohol anarchy by suspending regulation of imports in Michigan. It conflicts with the explicit language of the Twenty-first Amendment and repeated decisions of this Court holding that the Twenty-first Amendment gives States virtually plenary power to control the importation of alcoholic beverages for use by their residents. It also conflicts with recent decisions of the Seventh, Eleventh, and Fourth Circuits concerning similar statutes of other states. The issues presented are important for many reasons including: (i) the Sixth Circuit has left Michigan unable to control the flow of alcoholic beverage into the state, impairing Michigan's ability both to keep alcohol out of the hands of persons under 21 years of age and to collect important taxes; (ii) the Michigan statutory scheme is similar to laws of many other states, several of which are under current challenge; and (iii) the effect of the decision is to make Michigan's longstanding wine distribution system, which is largely regulated by a system of licensed "tiers", unfairly advantageous to non-licensed out-of-state wineries and retailers, which may now sell free of regulation directly to consumers, to the significant detriment to Michigan and its licensed wholesalers and licensed retailers who remain subject to regulation.[3]

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[3] This regulation includes, *inter alia*, a prohibition against a licensed Michigan wholesaler or retailer from owning an interest in a manufacturer of alcoholic beverages, such as a winery.

## I. THE SIXTH CIRCUIT DECISION CONFLICTS WITH THIS COURT'S DECISIONS INTERPRETING THE TWENTY-FIRST AMENDMENT.

As this Court explained in *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984), the purpose of Section 2 of the Twenty-first Amendment was to create an exception to the "dormant Commerce Clause" for one product only, so that States could control the flow of alcohol across their borders for use by their residents. *See Crisp*, 467 U.S. at 712. Nineteenth-century cases had held that the Commerce Clause prevented States from restricting the importation of alcohol, and Congress had responded in 1913 with the first Webb-Kenyon Act, 37 Stat. 699, making it a violation of federal law to import alcohol in violation of state law. *See Clark Distilling Co* v. *W. Maryland Railroad Co.*, 242 U.S. 311 (1917). After Prohibition, the Webb-Kenyon bar was reflected in the Constitution, in Section 2 of the Twenty-first Amendment. It is significant that *after* the Twenty-first Amendment was adopted, Congress (in 1935) exercised its Commerce Clause powers by re-enacting Webb-Kenyon, 27 U.S.C. § 122. Thus, both the Constitution and a federal statute now prohibit importation of alcoholic beverages in violation of state law.

This Court has consistently held that state control over the physical importation of alcoholic beverages—the core power conferred by the Twenty-first Amendment and Webb-Kenyon—is virtually plenary. *See, e.g., State Board of Equalization of California* v. *Young's Market Co.*, 299 U.S. 59, 62 (1936) (Section 2 "confer[s] upon the State the power to forbid all importations which do not comply with the conditions which it prescribes."); *Mahoney* v. *Joseph Triner Corp.*, 304 U.S. 401, 403 (1938) ("That ... discrimination against imported liquor is permissible ... was settled by" *Young's Market.*); *Indianapolis Brewing Co.* v. *Liquor Control Comm'n*, 305 U.S. 391, 394 (1939) ("[T]he right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause ...."); *Joseph S. Finch & Co.* v. *McKittrick*, 305 U.S. 395, 398 (1939); *Ziffrin, Inc.* v.

*Reeves*, 308 U.S. 132, 138 (1939) ("The Twenty-first Amendment sanctions the right of a State to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause"); *Carter* v. *Virginia*, 321 U.S. 131, 137 (1944).

Nor may these foundation cases be written off as historical relics. This Court has continued to cite those cases and has continued to apply the Twenty-first Amendment as written. *See Department of Revenue* v. *James B. Beam Distilling Co.*, 377 U.S. 341, 346 (1964) ("We have no doubt that under the Twenty-first Amendment Kentucky could not only regulate, but could completely prohibit ... importation .... There can surely be no doubt, either, of Kentucky's plenary power to regulate and control ... the distribution, use, or consumption of intoxicants within her territory after they have been imported");[4] *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980) ("The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system."); *Crisp*, *supra*; *North Dakota*, *supra*; *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 516 (1996) ("[T]he Twenty-first Amendment limits the effect of the dormant Commerce Clause on a State's regulatory power over the delivery or use of intoxicating beverages within its borders ....").

In *North Dakota*, Justice Stevens, writing for a four-Justice plurality, observed that "[u]nder the State's regulatory system ... out-of-state ... suppliers may sell only to licensed wholesalers or federal enclaves," 495 U.S. at 428, and stated that creation of such a system "fall[s] within the core of the State's power under the Twenty-first Amendment" and that the State's regulatory system is "unquestionably legitimate." *Id.* at 432. Justice Scalia, concurring in

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[4] The quoted language was written by Justice Stewart the same day he wrote the *Hostetter* opinion discussed *infra*.

the result, said, without qualification, "The Twenty-first Amendment . . . empowers North Dakota to require that all liquor sold for use in the State be purchased from an in-state wholesaler." *Id.* at 447. No Justice disagreed on this point. The ultimate question in *North Dakota* was whether a state could impose special labeling requirements on alcoholic beverages destined for federal enclaves within that state (to which the Court answered "yes"). The essential premise was that the state could channel all alcoholic beverages intended for its residents through licensed wholesalers and was entitled to protect its authorized distribution system against diversion of beverage alcohol sold to federal enclaves. *See* 495 U.S. at 430-433 (opinion of Stevens, J.); *id.* at 447 (Scalia, J., concurring in judgment).

No case in this Court—indeed, no opinion of any Justice—has suggested any dormant Commerce Clause limitation on a state's power over physical importation of alcohol for use by its residents. The Court has recognized that legitimate state objectives, including tax enforcement and temperance-related objectives such as preventing sales to minors, depend on state control over the physical flow of alcoholic beverages.

The Sixth Circuit treated this Court's cases sustaining broad state power under the Twenty-first Amendment as outmoded. Under the Sixth Circuit's decision, a court must first determine if a state law limiting importation violates the dormant Commerce Clause, as if the Twenty-first Amendment and the Webb-Kenyon Act did not exist.[5] If the answer is yes, the court must then determine if the state law is needed and whether it is the "least restrictive" means to achieve a "core" objective of the Twenty-first Amendment. Thus, in place of the broad authority expressly given to states by the Twenty-first Amendment and the Webb-Kenyon Act, the Sixth Circuit would substitute the kind of

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[5] Although petitioner and Michigan forcefully called the court's attention to Webb-Kenyon, the Sixth Circuit failed even to mention it.

judicial hostility usually associated with restrictions on speech or racial classifications.

The Sixth Circuit reached this result by seriously misreading the three Supreme Court cases on which it relied: *Hostetter, supra, Bacchus Imports, supra,* and *Healy* v. *Beer Institute,* 491 U.S. 324 (1989). None of those cases limits the plenary power of states to control importation of alcoholic beverages for domestic use. On the contrary, *Hostetter* reiterates importation power in strong terms. 377 U.S. at 330 ("This Court made clear in the early years following adoption of the Twenty-first Amendment that . . . a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders."). *See also James B. Beam Distilling Co., supra.* The holding of *Hostetter,* which is irrelevant here, was that the Amendment did not apply to shipments in bonded transit for ultimate delivery outside the state. 377 U.S. at 333-334. *Bacchus* involved discriminatory taxation, not importation requirements, and the State (Hawaii) barely attempted to invoke the Amendment in its defense. *See* 468 U.S. at 274 n.12. The author of the Court's opinion in *Bacchus,* Justice White, later joined Justice Stevens' plurality opinion in *North Dakota,* which described a state statute closely controlling importation and distribution as "unquestionably legitimate." 495 U.S. at 432. *Healy* involved a pricing scheme invalidated primarily because of its impact on commerce having no relationship to the regulating state. *See* 491 U.S. at 342-343.

The Sixth Circuit invalidated Michigan's ban on wine imports by unlicensed out-of-state entities to Michigan residents because Michigan allows licensed in-state wineries to ship limited quantities of wine directly to retail customers in the state. It ignored the fact that out-of-state wineries may equally locate in Michigan and be licensed to sell directly, and, that requiring a local presence has been upheld in the tobacco sales context based on police power authority alone. *Brown & Williamson Tobacco Corp.* v. *Pataki,* 320 F.3d 200 (2d Cir. 2003). The ruling by the Sixth Circuit in the instant

case would have astonished the Justices who joined unanimously in *Young's Market*, *Mahoney*, *Indianapolis Brewing*, and *Ziffrin*. Indeed, those cases plainly implied that a state could bar all importation of wine, allowing the sale of only locally produced wines, and the Court has never held otherwise. *See, e.g.*, *Young's Market*, 299 U.S. at 63 ("Can it be doubted that a state might establish a state monopoly of the manufacture and sale of beer, and ... prohibit all competing importations ...?").

Even if state laws controlling importation are now subject to constitutional evaluation of their treatment of various categories of market participants, state control of this branch of commerce is at least entitled (under the Twenty-first Amendment, the Webb-Kenyon Act, and this Court's cases) to deference comparable to congressional regulation of other forms of commerce. If Michigan does not have plenary authority over importation of alcoholic beverages, the proper constitutional inquiry would not be the "strict scrutiny" applied by the Sixth Circuit, but whether there is a sufficient rational basis for the lines Michigan has drawn. In this case, there is ample rational basis for the Michigan system. Out-of-state sellers ordinarily have no Michigan license and no physical presence in the state. In contrast, licensed in-state firms are entities whose backgrounds Michigan can investigate, whose premises Michigan can inspect and, if necessary, seize, and whose violations can be punished by enforceable fines or by license revocation (i.e., putting them entirely out of business). Interstate enforcement against an entity that is located beyond Michigan's borders is no substitute for local control of licensees with meaningful penalties that can include immediate arrest, search and seizure, and shutting down their entire business.

The Court should grant the writ to correct a decision that is contrary to the Twenty-first Amendment, the Webb-Kenyon Act, and this Court's cases.

## II. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THE SEVENTH, ELEVENTH, AND FOURTH CIRCUITS.

The Sixth Circuit's decision conflicts directly with the decision of the Seventh Circuit in *Bridenbaugh*, which upheld a similar Indiana statutory scheme against the same challenge. Indiana, like Michigan, permits "local wineries, but not [out-of-state] wineries ... to ship directly" to consumers. 227 F.3d at 851. The Seventh Circuit noted that the Twenty-first Amendment applies specifically to "importation" and that, "Every use of § 2 [of the Amendment] could be called 'discriminatory' in the sense that plaintiffs use that term .... If that [application of § 2 to imports] were the sort of discrimination that lies outside state power, then § 2 would be a dead letter." *Id.* at 853. Reciting the history of Section 2 and this Court's interpretations, the court found Indiana's control over imports plainly within its constitutional power, notwithstanding the rights given to local wineries and licensed retailers and wholesalers. The Seventh Circuit noted that "the main effect of Indiana's system is to subject ... [the plaintiffs' purchases of out-of-state wines] to taxation, by requiring the beverages to pass through the hands of permit holders whose business is closely monitored to ensure tax collection .... [T]his is precisely what § 2 is for." *Id.* at 854.

The Sixth Circuit explicitly disagreed with *Bridenbaugh*'s approach and its result. According to the court, "The proper approach" is "to apply the traditional dormant Commerce Clause analysis," and, if the provisions are found to be facially discriminatory, to apply "strict scrutiny" to determine whether the State has "no reasonable nondiscriminatory means of advancing the 'core concerns' of the Twenty-first Amendment." App. 12a. *Bridenbaugh*, the court said, "failed to engage in the requisite dormant Com-

merce Clause analysis," (App. 15a-16a), and reached the wrong conclusion.[6]

The Sixth Circuit's decision also conflicts squarely with the Eleventh Circuit's decision in *Bainbridge* v. *Turner*, 311 F.3d 1104 (11th Cir. 2002), in which the plaintiffs challenged Florida's wine importation laws. Although the Eleventh Circuit (like the Sixth Circuit) began its analysis with the dormant Commerce Clause, it recognized that the Twenty-first Amendment requires that State laws regulating alcohol importation be given substantial deference. In direct contrast to the Sixth Circuit, the Eleventh Circuit held that a State's burden in justifying its importation restrictions "is far less than the strict scrutiny required under a traditional tier-one [dormant Commerce Clause] analysis" and that a State "need *not* show that there are no nondiscriminatory alternatives available." *Id.* at 1114 n.17 (emphasis added).

Finally, the Sixth Circuit's decision with respect to remedy conflicts with the decision of the Fourth Circuit in *Beskind* v. *Easley*, 325 F.3d 506 (4th Cir. 2003). In that case, the Fourth Circuit ruled that a North Carolina statute similar to Michigan's and Indiana's improperly discriminated between out-of-state sellers and in-state wineries, but it reached a sharply different conclusion as to the appropriate remedy. As here, the plaintiffs sought to strike down the state limits on importation. The Fourth Circuit, however, noted that North Carolina (like Michigan) had enacted its controls on importation shortly after the end of Prohibition and (like Michigan) had added far more recently its permission for licensed in-state firms to ship directly to consumers. *Id.* at 518-519. Holding that the import restriction standing alone was valid, the Court said, "we can assume that North Carolina would wish us to take the course that least destroys

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[6] The court also said that *Bridenbaugh* was "distinguishable on its facts," but the *Bridenbaugh* opinion makes clear that Indiana, like Michigan, permitted "local wineries but not [out-of-state] wineries . . . to ship directly" to consumers. 227 F.3d at 851. These are the only facts the Sixth Circuit found pertinent in the present case.

the regulatory scheme that it has put into place pursuant to its powers under the Twenty-first Amendment," *id.* at 519. Instead of alcohol anarchy as a remedy, *Beskind* remanded for a remedy excising the exception for local firms, thus leaving importation subject to regulation.

Here, the Sixth Circuit was presented with exactly the same clash with respect to the remedy for the supposed constitutional violation: plaintiffs' complaint urged invalidation of the entire statutory scheme, while petitioner and Michigan, on petition for rehearing, urged in the alternative the Fourth Circuit's remedy of merely striking the provision permitting direct shipment by local licensed winemakers. Michigan's ban on importation, like North Carolina's, can clearly stand alone if the in-state winery exception is severed: in both states, the general ban was enacted shortly after the end of Prohibition and did stand alone until the exception was adopted half a century later, in 1985, in Michigan's case. *See* 1985 Public Act No. 123, Mich. Comp. Laws § 436.1113(9). The Sixth Circuit, nonetheless, insisted on granting judgment for the plaintiffs, thus invalidating the entire direct shipment statute.

The Sixth Circuit's ruling not only destroys the keystone of Michigan's alcoholic beverage control system, namely the control over alcoholic beverage importation which the Twenty-first Amendment and the Webb-Kenyon Act expressly permit, but also has the perverse effect of discriminating in reverse. In-state sellers of wine remain subject to licensing and extensive regulation, and to monetary penalties and loss of their licenses for improper sales (such as to minors), while out-of-state sellers are now free to respond to any order they receive on the telephone or internet seeking importation, without the substantial burden of obtaining a license and complying with the myriad of laws and rules required by such licensure. As a practical matter, they are far less subject to meaningful penalties if the recipient is, for example, a minor. All of these untoward consequences result from the Sixth Circuit's mistaken belief that the "dormant" Commerce Clause gives it a commission to "im-

prove" state regulations governing imports of alcoholic beverages.

## III. THE ISSUES ARE OF NATIONWIDE IMPORTANCE.

This Court should grant the writ because the issues involved are of nationwide importance and the lower courts are in urgent need of guidance on the conflicts created by the Sixth Circuit's decision. Many other states have statutes that, like those in Michigan, Indiana, North Carolina, and Florida, prohibit out-of-state sellers from shipping directly to in-state consumers but permit licensed in-state sellers to do so.[7] There is currently a wave of judicial attacks on these state statutes. In addition to the four cases discussed in Section II, *supra*, the Fifth Circuit has already issued a decision invalidating Texas's wine import laws, *see Dickerson* v. *Bailey*, 336 F.3d 388 (5th Cir. 2003), and a similar case regarding New York's laws is currently pending in the Second Circuit. *Swedenburg* v. *Kelly*, No. 02-9511 (2d Cir.). A number of other cases are pending in the federal district courts.[8] With-

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[7] Many States have similar statutes barring out-of-state suppliers from sending alcoholic beverages into the State to anyone other than the State itself or a licensed wholesaler. *See, e.g.*, Ala. Admin. Code R. 20-X-8.04(1); Ark. Code Ann. § 3-7-106(a)(1); Del. Code Ann. tit. 4, § 501; Fla. Stat. Ann. § 561.545; Ga. Code Ann. § 3-3-32; Haw. Rev. Stat. Ann. § 281-3; Ind. Code §§ 7.1-5-1-9.5, 7.1-5-11-1.5; Kan. Stat. Ann. §§ 41-104, 41-306, 41-306a(a); Ky. Rev. Stat. Ann. § 244.165; Me. Rev. Stat. Ann. tit. 28-A, § 2077-B; Md. Ann. Code art. 2B, § 16-506.1; Mass. Gen. Laws Ann. ch. 138, § 2; Miss. Code Ann. § 97-31-47; Mont. Code Ann. § 16-3-402; N.J. Stat. Ann. § 33:1-2; Ohio Rev. Code Ann. §§ 4301.19, 4301.20; N.Y. Alco. Bev. Cont. Law § 102(1)(c); Okla. Stat. Ann. tit. 37, § 505; Pa. Stat. Ann. tit. 47, § 4-410; S.C. Code Ann. § 12-21-1610; S.D. Codified Laws §§ 35-4-66, 35-4-67; Tenn. Code Ann. § 57-3-402; Tex. Alco. Bev. Code Ann. § 107.05; Utah Code Ann. §§ 32A-8-201, 32A-8-301; Vt. Stat. Ann. tit. 7, § 305; Wyo. Stat. Ann. §§ 12-2-203, 12-3-101. A number of these states permit some form of direct shipment by state licensees. *See, e.g.*, Ariz. Rev. Stat. § 4-203; Fla. Stat. Ann. § 561.57(2); Ind. Code §§ 7.1-3-13-3(a), 7.1-3-14-4(c); N.J. Stat. Ann. §§ 33:1-2(a), 33:1-10(2a), 33:10(2b), 33:1-28.1; N.Y. Alco. Bev. Cont. Law §§ 76(4), 77(2); Ohio Rev. Code Ann. § 4303.03.

[8] *See, e.g., Stahl* v. *Taft*, No. 03-CV-00597 (S.D. Ohio); *Freeman* v. *McGreevey*, No. 03-CV-03140 (D.N.J.); *Woolfson* v. *Tick*, No. 03-CV-463

out further guidance from this Court, the legal conflicts described above threaten to become worse.

The state statutes under attack are at the heart of State control over alcoholic beverages. States can enforce their rules against sales to minors, alcohol content restrictions, labeling requirements, and excise tax laws in large part *because* they can require *all* alcoholic beverages to be sold exclusively through state licensees. Michigan licensees must also abide by restrictions prohibiting wholesalers from owning interests in manufacturers or retailers. If wine can bypass state licensees and be shipped directly to consumers from across state lines, the states will lose a large measure of control over alcohol within their territories and will be frustrated in their efforts to pursue their legitimate regulatory objectives. Furthermore, although the Sixth Circuit's decision ostensibly governs only Michigan's wine laws, nothing in the opinion indicates why it would not also apply to similar regulations of competing alcoholic beverages including distilled spirits and beer. This decision, in conjunction with the other challenges, will result in the ultimate dismantling of long-standing state alcoholic beverage regulatory systems.

The Sixth Circuit's decision interferes with a state's exercise of a right not merely "reserved" to the states but explicitly granted to the states by the Twenty-first Amendment and by Congress first in 1913 and then again in 1935 when Congress re-enacted the Webb-Kenyon Act. This Court should grant the writ to resolve whether states may continue their patterns of regulating alcohol importation and what the proper remedy is if they may not. Finally, this Court should grant the writ to correct a fundamental misinterpretation of the federal-state relationship on a point about which the Constitution could not be clearer.

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(D.R.I.); *Parker* v. *Morrison*, No. 03-CV-1948 (D. Ariz.); *Bainbridge* v. *Turner*, No. 99-CV-2681 (M.D. Fla.) (on remand).

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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FEBRUARY 2004

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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No. 01-2720

ELEANOR HEALD; RAY HEALD; JOHN ARUNDEL; KAREN BROWN; RICHARD BROWN; BONNIE MCMINN; GREGORY STEIN; MICHELLE MORLAN; WILLIAM HORWATH; MARGARET CHRISTINA; ROBERT CHRISTINA; TRISHA HOPKINS; JIM HOPKINS; DOMAINE ALFRED, INC.,

*Plaintiffs-Appellants,*

*v.*

JOHN ENGLER, Governor; JENNIFER M. GRANHOLM, Attorney-General; JACQUELYN STEWART, Chairperson, Michigan Liquor Control Commission, in their Official Capacities,

*Defendants-Appellees,*

Michigan Wine & Beer Wholesalers Association,
*Intervening Defendant-Appellee.*

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Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 00-71438 – Bernard A. Friedman,
District Judge.

Argued: May 7, 2003

Decided and Filed: August 28, 2003

Before: GUY, BOGGS, and DAUGHTREY, Circuit Judges.

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## OPINION

MARTHA CRAIG DAUGHTREY, Circuit Judge. In this civil rights action brought pursuant to 42 U.S.C. § 1983, the plaintiffs raise a constitutional challenge to Michigan's alcohol distribution system, contending that state provisions differentiating between in-state and out-of-state wineries violate the Commerce Clause.[1] Those regulations prohibit

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[1] Similar actions have been brought challenging direct shipment bans in North Carolina, Virginia, Indiana, Texas, Florida and New York, among other states. *See, e.g., Beskind v. Easley,* 325 F.3d 306 (4th Cir. 2003) (affirming lower court finding that North Carolina's statutory scheme discriminates between in-state and out-of-state wineries, violates the Commerce Clause, and is not "saved" by the Twenty-first Amendment); *Bainbridge v. Turner,* 311 F.3d 1104, 1115 (11th Cir. 2002) (finding that Florida's alcohol distribution statutes' differentiation between in-state and out-of-state wineries facially discriminates against interstate commerce and remanding for further fact-finding on whether Florida's statutory scheme is "necessary to effectuate the . . . core concern [of revenue raising] in a way that justifies treating out-of-state firms differently from in-state firms"); *Bridenbaugh v. Freeman-Wilson,* 227 F.3d 848, 851 (7th Cir. 2000) (finding that Indiana's ban on direct shipment from out-of-state wineries is constitutional because " § 2 of the twenty-first amendment empowers Indiana to control alcohol in ways that it cannot control cheese"); *Swedenburg v. Kelly,* 232 F. Supp. 2d 135 (S.D. N.Y. 2002) (finding that New York's ABC law's ban on direct shipment of out-of-state wine is unconstitutional); *Dickerson v. Bailey,* 212 F. Supp. 2d 673, 695 (S.D. Tex. 2002) (finding that Texas's ban on direct shipment by out-of-state wineries violates the dormant Commerce Clause and noting that the state had "fail[ed] to demonstrate how a statutory exception for local wineries from Texas' three-tier regulatory system . . . is justified by any of the traditional core concerns of the twenty-first amendment" or to show "that the core interests of taxation and orderly market conditions . . . could not be effected by alternative, nondiscriminatory options for these out-of-state wineries"), *aff'd, Dickerson v. Bailey,* 336 F.3d 388 (5th Cir. 2003); *Bolick v. Roberts,* 199 F. Supp. 2d 397, 409 (E.D.Va. 2002) (adopting, with amendments, magistrate judge's findings that Virginia's ABC laws violated the dormant Commerce Clause and that the state had failed to produce "any meaningful evidence" showing that the state cannot "accomplish its legitimate interests without discriminating against out-of-state direct shippers of wine"), *vacated by Bolick v. Danielson,* 330 F.3d 274 (4th

the direct shipment of alcoholic beverages from out-of-state wineries, while allowing in-state wineries to ship directly to consumers, provided that the in-state wineries comply with certain minimal regulatory requirements. The plaintiffs, who include wine connoisseurs, wine journalists, and one small California winery that ships its wines to customers in other states, claim that this system is unconstitutional under the dormant Commerce Clause because it interferes with the free flow of interstate commerce by discriminating against out-of-state wineries. The defendants, who include Michigan officials (referred to collectively in this opinion as "the state") and the intervening trade association, argue in response that Michigan's regulatory scheme is constitutional under the Twenty-first Amendment to the federal constitution.

The parties filed cross-motions for summary judgment, and the district court granted the state's motion and denied the plaintiffs' motion. The plaintiffs then filed a motion to reconsider, arguing that the district court should have addressed cross-motions to strike various evidence submitted by the two sides prior to the summary judgment decision.[2]

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Cir. 2003) (remanding for reconsideration in light of intervening change in applicable statutes); *see also Cooper v. McBeath*, 11 F.3d 547 (5th Cir. 1994) (striking down Texas's three-year durational residency and citizenship requirements for obtaining a liquor permit because these restrictions violated the dormant Commerce Clause and were not "saved" by the Twenty-first Amendment).

[2] Affidavits submitted by the plaintiffs included statements from various oenophiles; the Healds, who are wine critics and consultants; Domaine Alfred, a California winery; and several other wine and alcohol manufacturers and distributers. Many of the affiants attested to their desire to have wine from out-of-state wineries shipped directly to their homes, their inability to do so, the general unavailability of certain wines in Michigan, and the willingness of the wineries and distributors to pay required taxes and obtain necessary permits, if allowed to ship directly to consumers.

Documents filed on behalf of the defendants included reports from the Michigan Department of Treasury, Office of Revenue and Tax

The district court denied the motion to reconsider, noting that it had effectively denied the cross-motions to strike as moot, because it did not consider the challenged evidence in deciding the summary judgment motions.

The plaintiffs now appeal both the grant of summary judgment and the denial of their motion to reconsider. For the reasons set out below, we conclude that the regulations in question are discriminatory in their application to out-of-state wineries, in violation of the dormant Commerce Clause, and cannot be justified as advancing the traditional "core concerns" of the Twenty-first Amendment. We therefore reverse the district court's judgment and remand the case with directions to the district court to enter judgment in favor of the plaintiffs.

## PROCEDURAL AND FACTUAL BACKGROUND

Michigan regulates alcohol sales under a "three-tier system": consumers must purchase alcoholic beverages from licensed retailers; retailers must purchase them from licensed wholesalers; and wholesalers must purchase them from licensed manufacturers. This system is similar to that used by

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Analysis, which detailed estimates of lost tax revenue to remote sales; an affidavit from the manager of the Manufacturers and Wholesalers Section of the Licensing Division of the Michigan Liquor Control Commission that listed all licensed "Outstate Seller of Wine" license holders; an affidavit from the director of the Licensing Division of the Michigan Liquor Control Commission averring that, of the wineries from which the plaintiffs wish to purchase wine, some are licensed as out-of-state sellers, and the others have not applied for such licenses; an affidavit from the director of the Enforcement Division of the Michigan Liquor Control Commission detailing the number of "controlled buy operations" conducted by the Commission in Michigan to identify retailers that sell alcohol to minors; an affidavit from an assistant in the Liquor Control Division of the Michigan Department of Attorney General, detailing controlled buy operations conducted over the internet; and an (unsworn) statement by Sen. Orrin Hatch, made before the Senate Judiciary Committee, entitled "Interstate Alcohol Sales and the 21st Amendment."

most states. *See* Vijay Shankar, *Alcohol Direct Shipment Laws*, 85 Va. L. Rev. 353, 355 (1999).

The plaintiffs allege that Michigan's system discriminates against out-of-state wineries in favor of in-state wineries because it prevents out-of-state wineries from shipping wine directly to Michigan consumers, which in-state wineries are allowed to do. As the district court correctly noted, this distinction between in-state and out-of-state wineries can only be understood by reading a number of provisions in conjunction with each other:

> [The distinction] can be gleaned from various Michigan Liquor Control Commission regulations, which are codified within the Michigan Administrative Code. R436.1057 states that "[a] person shall not deliver, ship, or transport into this state beer, wine, or spirits without a license authorizing such action. . . ." The only applicable license, an "outstate seller of wine license," may according to R436.1705(2)(d) be obtained by a "manufacturer which is located outside of this state, but in the United States, and which produces and bottles its own wine." However, under R436.1719(4) the holder of such a license may ship wine "only to a licensed wholesaler at the address of the licensed premises except upon written order of the commission." In answers to interrogatories, a representative of the Michigan Liquor Control Commission indicates that "[a]t present, there is no procedure whereby an out-of-state retailer or winery can obtain a license or approval to deliver wine directly to Michigan residents . . . ."
>
> In contrast, the Michigan Liquor Control Commission indicates that the "ability to deliver wine to the consumer is available to winemakers licensed in Michigan, inasmuch as under the provisions of MCL 436.1113(9) these licensees are

> permitted to sell at retail the wines they manufacture. . . . A licensed Michigan winemaker may deliver their [sic] own products to customers without an SDM [specially designated merchant] license . . . .

The plaintiffs contend that this differential treatment of in-state and out-of-state wineries violates the dormant Commerce Clause because it gives in-state wineries a competitive advantage over out-of-state wineries. In-state wineries can, for example, bypass the price mark-ups of a wholesaler and retailer, making in-state wines relatively cheaper to the consumer and allowing them to realize more profit per bottle. In addition, the cost to an out-of-state winery of the license that enables it to sell to a Michigan wholesaler is $300, while a comparable Michigan winery must pay only a $25 license fee to qualify to ship wine directly to Michigan customers. Finally, for customers who desire home delivery, Michigan wineries have a competitive advantage over out-of-state wineries that cannot ship directly to customers. In response, the state argues that the regulations to which an in-state winery is subject "more than offset, both in costs and burden, any nominal commercial advantage given by the ability to deliver directly to customers" and characterizes the burden on out-of-state wineries as "de minimis."

In its order granting summary judgment to the state and denying summary judgment to the plaintiffs, the district court held that "Michigan's direct shipment law is a permitted exercise of state power under § 2 of the 21st Amendment" because it is not "mere economic protectionism." In reaching this conclusion, the court found that Michigan's statutory scheme was designed "to ensure the collection of taxes from out-of-state wine manufacturers and to reduce the risk of alcohol falling into the hands of minors."

After this order had issued, the plaintiffs filed a motion to reconsider, asking the district court to rule on the motions

to strike before granting either side summary judgment and to "make specific findings of fact based on the record" before reaching a final decision. The plaintiffs argued that the district court's failure to rule on the motions to strike "left the record devoid of evidence supporting the court's conclusion that the direct shipment law furthers legitimate 21st Amendment purposes," and that the court had applied the incorrect legal standard in dismissing the complaint. The district court denied the plaintiffs' motion for reconsideration, saying that it had not considered the challenged evidence in ruling on the summary judgment motions and that the motions to strike were effectively denied as moot.

For the reasons set out below, we reverse the district court's judgment, vacate the order granting summary judgment in the state's favor, and remand the case for entry of summary judgment in favor of the plaintiffs.

## DISCUSSION

The central question in this case is how the "dormant" Commerce Clause and the Twenty-first Amendment interact to limit the ways in which a state can control alcohol sales and distribution. Article I, Section 8, Clause 3 of the United States Constitution grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ." The Supreme Court has long held that "this affirmative grant of authority to Congress also encompasses an implicit or 'dormant' limitation on the authority of the States to enact legislation affecting interstate commerce." *Healy v. The Beer Institute,* 491 U.S. 324, 326 n.1 (1989) (citations omitted).

In 1933, Congress enacted the Twenty-first Amendment, which repealed the 18th Amendment, thereby ending Prohibition. Section 2 of the Twenty-first Amendment prohibits "[t]he transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws

thereof . . . ." Initially, the Supreme Court afforded the states nearly limitless power to regulate alcohol under the new amendment. *See, e.g., Ziffrin, Inc. v. Reeves,* 308 U.S. 132, 138 (1939) ("The Twenty-first Amendment sanctions the right of a state to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause."); *Indianapolis Brewing Co. v. Liquor Control Comm'n,* 305 U.S. 391, 394 (1939) ("Since the Twenty-first Amendment . . . the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the Commerce Clause. . . ."); *State Bd. of Equalization v. Young's Market Co.,* 299 U.S. 59 (1936).

The state relied on these cases in the district court, but we find that reliance disingenuous at best because, as early as the 1960s, the Supreme Court signaled a break with this line of reasoning. In *Hostetter v. Idlewild Bon Voyage Liquor Corp.,* 377 U.S. 324, 331-32 (1964), a case involving the prohibition of liquor sales to departing international airline travelers, the Court observed:

> To draw a conclusion from this line of decisions [*Ziffrin, Young's Market,* etc.] that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification. If the Commerce Clause had been pro tanto 'repealed,' then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect. . . .
>
> Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.

> The Supreme Court's approach to cases involving the intersection of the Commerce Clause and the Twenty-first Amendment has continued to develop since *Hostetter*. In *Capital Cities Cable v. Crisp*, 467 U.S. 691 (1984), although not a liquor importation or Commerce Clause case, the Court found that a state ban on alcohol advertising conflicted with regulations of the Federal Communications Commission. The Court applied a balancing test to determine "whether the interests implicated by a state regulation are so closely related to the powers reserved by the [Twenty-first] Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies." *Id.* at 714. The Court concluded that the federal interest must prevail because the state's banning of alcohol advertising did not directly relate to the core concerns of the Twenty-first Amendment, *i.e.*, to exercise "control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Id.* at 715 (quotation omitted).

In subsequent cases, the Supreme Court has continued to analyze challenges to state alcohol laws by determining how closely related the law in question is to the "core concerns" of the Twenty-first Amendment. Shortly after *Capital Cities* was decided, the Court issued *Bacchus Imports v. Dias*, 468 U.S. 263 (1984), in which out-of-state wholesalers challenged a Hawaii excise tax exemption for certain locally produced alcoholic beverages. The state argued that the statute advanced legitimate state interests, that it imposed no patent discrimination against interstate trade, and that the effect on interstate commerce was minimal. *Id.* at 270. The Court rejected these defenses, finding that "the legislation constitutes 'economic protectionism' in every sense of the phrase," *id. at* 272, and noting that "one thing is certain: The

central purpose of the [21st Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition." *Id.* at 276. Instead, the Court considered "whether the principles underlying the [Twenty-first] Amendment are sufficiently implicated by the [tax exemption] to outweigh the Commerce Clause principles that would otherwise be offended." *Id.* at 275. In *Bacchus*, the state did not contest that the law's purpose was "to promote a local industry," so the Court did not have to engage in the normal Commerce Clause analysis of whether the law was sufficiently closely related to the promotion of lawful interests to vitiate its discriminatory effect. Instead, it found that the law discriminated against interstate commerce in violation of the Commerce Clause and was therefore unconstitutional.

Since *Bacchus*, the Supreme Court has been less than prolific in construing the content of the Twenty-first Amendment's "core concerns," addressing the definition of "core concerns" only once - and then only in a plurality opinion. In *North Dakota v. United States,* 495 U.S. 423 (1990), the Court had before it an intergovernmental immunity case, rather than a Commerce Clause challenge. At issue was whether North Dakota's reporting and labeling requirements were constitutional, despite interfering with contrary federal interests in selling liquor to military personnel. The Court upheld the statute, finding that the state regulations "fall within the core of the State's power under the *Twenty-first Amendment*" because they were enacted "[i]n the interest of promoting temperance, ensuring orderly market conditions, and raising revenue . . . ." *Id.* at 432.

But, because *North Dakota* did not involve a Commerce Clause challenge, the *analysis* in the plurality opinion cannot be taken to control the analysis in this case. That is, we do not interpret the "in the interest of" language to mean that a state need only be *motivated* by the "core concerns" of the Twenty-first Amendment to shield its laws from

constitutional scrutiny. Under a Commerce Clause analysis, facially discriminatory laws are still subject to strict scrutiny, meaning that the state must demonstrate that no reasonable nondiscriminatory alternatives are available to advance the same legitimate goals. *See, e.g., Hughes v. Oklahoma,* 441 U.S. 322, 336-7 (1979) (finding that, "at a minimum," a statute that "on its face discriminates against interstate commerce . . . invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives"). Likewise, the language in *North Dakota* to the effect that the states have "virtually complete control" over the importation and sale of liquor, although heavily emphasized by the district court in this case, has little value in a case requiring a Commerce Clause analysis. Because *North Dakota* did not involve interpretation of the Commerce Clause, we reject the implication that a state's "virtually complete control" over liquor regulation enables it to discriminate against out-of-state interests in favor of in-state interests. *Bacchus* simply forbids such an analysis.

Given this background, we cannot endorse the district court's characterization of the regulation in this case as a constitutionally benign product of the state's three-tier system and, thus, "a proper exercise of [Michigan's Twenty-first Amendment] authority, despite the fact that such a system places a minor burden on interstate commerce." Instead, we invoke Justice Scalia's view, expressed in an opinion concurring in the Supreme Court majority's decision striking down a state price-affirmation statute, in which he explained that:

> [The law's] invalidity is fully established by its facial discrimination against interstate commerce . . . . This is so despite the fact that the law regulates the sale of alcoholic beverages, since its discriminatory character eliminates the immunity afforded by the Twenty-first Amendment.

*Healy v. Beer Institute*, 491 U.S. 324, 344 (1989) (Scalia, J., concurring) (citations omitted).

The proper approach in this case, then, is to apply the traditional dormant Commerce Clause analysis and, if the provisions are unconstitutional under the Commerce Clause, to determine whether the state has shown that it has no reasonable nondiscriminatory means of advancing the "core concerns" of the Twenty-first Amendment.

In reviewing challenges brought under the Commerce Clause, the Supreme Court has long held that statutes that facially discriminate are "virtually *per se*" invalid, citing as a clear example "a law that overtly blocks the flow of interstate commerce at a State's borders." *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). However, a lower level of scrutiny is applied when a statute does not discriminate on its face:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . [T]he extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

*Id., quoting Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Moreover, we have recognized the following test for determining whether state economic regulations violate the dormant Commerce Clause:

> When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, [the Supreme Court has] generally struck down the statute without further inquiry. When, however, a statute has only indirect

> effects on interstate commerce and regulates evenhandedly, [the Supreme Court has] examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits. In either situation the critical consideration is the overall effect of the statute on both local and interstate activity.

*McNeilus Truck & Mfg., Inc. v. Ohio ex rel. Montgomery*, 226 F.3d 429, 442 (6th Cir. 2000) (quotations omitted).

As we indicated in *McNeilus*, the proper starting point for dormant Commerce Clause analysis is to determine whether, in fact, the state provision "directly, in effect, or in purpose treats in-state and out-of-state interests differently . . . ." *Id.* If a court finds that the statute does discriminate, then the issue becomes, applying "rigorous scrutiny [,] . . . whether the statute serves a legitimate state interest that cannot otherwise be met." *Id.* In other words, laws that facially discriminate are normally invalid, unless they advance "a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988) (citations omitted).

Here, it is clear that the Michigan statutory and regulatory scheme treats out-of-state and in-state wineries differently, with the effect of benefitting the in-state wineries and burdening those from out of state. As discussed above, Michigan wineries enjoy both greater access to consumers who wish to have wine delivered to their homes, and greater profit through their exemption from the three-tier system. Out-of-state wineries, on the other hand, must participate in the costly three-tier system, to their economic detriment and, although this is not clear from the record, may be shut out of the Michigan market altogether if unable to obtain a wholesaler. The Fourth Circuit reached a similar conclusion in a case considering North Carolina's alcohol distribution system, which is nearly identical to Michigan's. In *Beskind v.*

*Easley*, 325 F.3d 506 (4th Cir. 2003), the court found that North Carolina's alcohol distribution laws, which discriminate against out-of-state wineries in favor of in-state wineries, are unconstitutional unless "the State can show that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id.* at 515 (internal quotations and citations omitted).

Having determined that the provision is facially discriminatory, we now turn to the question of whether the regulatory scheme is nevertheless constitutional because it "fall[s] within the core of the State's power under the Twenty-first Amendment," having been enacted "in the interest of promoting temperance, ensuring orderly market conditions, and raising revenue," *North Dakota v. United States*, 495 U.S. 423, 432 (1990), and because these interests "cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988) (citations omitted).

We conclude, based on the evidence in the record, that defendants have not shown that the Michigan scheme's discrimination between in-state and out-of-state wineries furthers any of the concerns listed above, much less that no reasonable non-discriminatory means exists to satisfy these concerns. This is so even if, taking the evidence in the light most favorable to defendants, we assume that all of the evidence they submitted was admissible. It is important to keep in mind that the relevant inquiry is not whether Michigan's three-tier system *as a whole* promotes the goals of "temperance, ensuring an orderly market, and raising revenue," but whether the discriminatory scheme challenged in this case - the direct-shipment ban for out-of-state wineries - does so. *See, e.g., Beskind*, 325 F.3d at 517 ("The question is not whether North Carolina can advance its regulatory purpose by imposing fewer burdens on in-state wineries than out-of-state wineries . . . . Rather, the question is whether

*discriminating* in favor of in-state wineries . . . serves a Twenty-first Amendment interest."). Obviously, the state bears the burden of justifying a discriminatory statute, and "the standards for such justification are high." *New Energy Co.*, 486 U.S. at 278; *see also Cooper v. McBeath*, 11 F.3d 547, 553 (5th Cir. 1994) (describing the burden of proof faced by the state as "towering"); *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979) ("[F]acial discrimination by itself may be a fatal defect. . . . [A]t a minimum [it] invokes the strictest scrutiny.").

The district court correctly recognized that state liquor laws are not completely immune from Commerce Clause challenges, but it placed too much reliance on Supreme Court precedent that has specifically upheld the three-tier distribution system, quoting *North Dakota v. United States*, 495 U.S. at 431, for the proposition that the states have "virtually complete control" over the importation and sale of liquor. As we noted above, however, *North Dakota* involved a Supremacy Clause challenge and did not implicate the Commerce Clause. It therefore cannot be relied on in this case in light of Supreme Court cases that do discuss the intersection of the Twenty-first Amendment and the Commerce Clause, such as *Bacchus*.

Nor do we find persuasive the district court's reliance on three additional cases. One, *House of York, Ltd. v. Ring*, 322 F. Supp. 530 (S.D.N.Y. 1970), is a district court opinion that pre-dates *Bacchus*. The second, *Bainbridge v. Bush*, 148 F. Supp. 2d 1306 (M.D.Fla. 2001), has subsequently been reversed. *See Bainbridge v. Turner*, 311 F.3d 1104 (11th Cir. 2002) (holding that the state must show that an alcohol-distribution statute that discriminates between in-state and out-of-state wineries furthers core concerns of the Twenty-first Amendment in order to survive a Commerce Clause challenge). The third, *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000), is the sole federal court of appeals decision to find that analogous direct shipment laws are

constitutional under the Twenty-first Amendment. However, *Bridenbaugh* is distinguishable on its facts, and it has been criticized by several federal courts for its failure to engage in the requisite dormant Commerce Clause analysis. *See, e.g., Bolick v. Roberts,* 199 F. Supp. 2d 397, 408 (E.D. Va. 2002) (finding *Brindenbaugh* "improperly decided because it does not rely on the established dormant Commerce Clause analysis"); *Dickerson v. Bailey,* 212 F. Supp. 2d 673, 682 (S.D. Tex. 2002) (observing that in its "concentration on Indiana's three-tiered scheme . . . [the court] did not discuss the last forty years of Supreme Court jurisprudence relating to balancing and harmonizing the dormant commerce clause and § 2 of the twenty-first Amendment"), *aff'd, Dickerson v. Bailey,* 336 F.3d 388 (5th Cir. 2003) (finding that *Brindenbaugh* was factually distinguishable from that case); *Bainbridge v. Turner,* 311 F.3d 1104, 1114 n.15 (11th Cir. 2002) (commenting that the court "disagree[s] with the analytical framework used in [*Bridenbaugh*]").

For example, *Bridenbaugh* did not involve any out-of-state wineries as plaintiffs, and it thus addressed only whether the Indiana statute discriminated against customers who wanted to have out-of-state wine shipped directly to them. Furthermore, it appears the Indiana statutes differ from the provisions at issue here, as the court found that "Indiana insists that *every* drop of liquor pass through its three-tiered system and be subjected to taxation." *Bridenbaugh,* 227 F.3d at 853. Michigan, on the other hand, effectively exempts in-state wineries from the three-tier system, an exemption it does not extend to out-of-state wineries. Finally, in contrast to this case, the *Bridenbaugh* plaintiffs were "concerned only with direct shipments from out-of-state sellers who lack *and do not want* Indiana permits." *Id.* at 854. By contrast, the plaintiffs in this case are willing to acquire Michigan permits and pay taxes on wines shipped; they simply want to be eligible for such permits on the same basis as in-state

wineries. For all of these reasons, we do not find the opinion in *Bridenbaugh* persuasive.

The district court in this case was correct in finding that the Michigan alcohol distribution system discriminates between in-state and out-of-state interests to the extent that in-state wineries may obtain licenses to ship wine directly to consumers, but out-of-state wineries may not and are instead required to go through the more costly three-tier system. What the district court did not do was undertake the necessary analysis that follows from such a finding. Instead, it concluded that Michigan's system "cannot be characterized as 'mere economic protectionism,'" because the system furthers the "core concerns" of the Twenty-first Amendment. The district court's observation that "[t]he Michigan Legislature has chosen this path to ensure the collection of taxes from out-of-state wine manufacturers and to reduce the risk of alcohol falling into the hands of minors" and its conclusion that "the 21st Amendment gives it the power to do so," without more, do not constitute strict scrutiny, as required by Supreme Court precedent. It is not enough that the Michigan Legislature has chosen this particular regulatory scheme to further what are legitimate objectives. The proper inquiry, detailed above, is whether it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988). We find no evidence on this record that it does.

## CONCLUSION

For the reasons set out above, we REVERSE the judgment of the district court granting summary judgment to the defendants and REMAND the case for entry of judgment in favor of the plaintiffs.

## APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 01-2720

[FILED]
[AUG 28 2003]
[LEONARD GREEN, Clerk]

ELEANOR HEALD; RAY HEALD; JOHN ARUNDEL; KAREN BROWN; RICHARD BROWN; BONNIE McMINN; GREGORY STEIN; MICHELLE MORLAN; WILLIAM HORWATH; MARGARET CHRISTINA; ROBERT CHRISTINA; TRISHA HOPKINS; JIM HOPKINS; DOMAINE ALFRED, INC.,

*Plaintiffs – Appellants,*

v.

JOHN ENGLER, Governor; JENNIFER M. GRANHOLM, Attorney General; JACQUELYN STEWART, Chairperson, Michigan Liquor Control Commission, in their Official Capacities,

Defendants – Appellees,

MICHIGAN WINE & BEER WHOLESALERS ASSOCIATION,

Intervening Defendant – Appellee.

Before: GUY, BOGGS, and DAUGHTREY, Circuit Judges.

**JUDGMENT**

On Appeal from the United States District Court for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is REVERSED and the case is REMANDED for entry of judgment in favor of the plaintiffs.

ENTERED BY ORDER OF THE COURT

S/S

Leonard Green, Clerk

## APPENDIX C

No. 01-2720

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[FILED]
[NOV 4 2003]
[LEONARD GREEN, Clerk]

| | | |
|---|---|---|
| ELEANOR HEALD, ET AL., | ) | |
| | ) | |
| Plaintiffs-Appellants, | ) | |
| | ) | |
| v. | ) | ORDER |
| | ) | |
| JOHN ENGLER, GOVERNOR ET AL., | ), | |
| | ) | |
| | ) | |
| Defendants-Appellees, | ) | |
| | ) | |
| MICHIGAN WINE & BEER WHOLESALERS ASSOCIATION, | ) | |
| | ) | |
| | ) | |
| Intervening-Defendant-Appellee. | ) | |
| | ) | |
| | ) | |

BEFORE: BOGGS, Chief Judge; GUY and DAUGHTREY, Circuit Judges.

The court having received two petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petitions for rehearing have been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the case. Accordingly, the petitions are denied.

ENTERED BY ORDER OF THE COURT

S/S

Leonard Green, Clerk

**APPENDIX D**

Case No: 01-2720

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

[FILED]
[NOV 21 2003]
[LEONARD GREEN, Clerk]

ELEANOR HEALD; RAY HEALD; JOHN ARUNDEL; KAREN BROWN; RICHARD BROWN; BONNIE MCMINN; GREGORY STEIN; MICHELLE MORLAN; WILLIAM HORWATH; MARGARET CHRISTINA; ROBERT CHRISTINA; TRISHA HOPKINS; JIM HOPKINS; DOMAINE ALFRED, INC.

Plaintiffs-Appellants,

v.

JOHN ENGLER, Governor;
JENNIFER M. GRANHOLM, Attorney General;
JACQUELYN STEWART;

Defendants-Appellees,

MICHIGAN WINE & BEER WHOLESALERS ASSOCIATION,

Intervening-Defendants-Appellees.

BEFORE: BOGGS, Chief Judge; GUY and DAUGHTREY, Circuit Judges.

Upon consideration of the appellee's motion to stay mandate,

It is ORDERED that the mandate be stayed to allow 90 days time to file a petition for a writ of certiorari, and thereafter until the Supreme Court disposes of the case, but shall promptly issue if the petition is not filed within ninety days from the date of final judgment by this court.

ENTERED BY ORDER OF THE COURT

S/S

Leonard Green, Clerk

## APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ELEANOR HEALD, et al.,

Plaintiffs,

Civil Action No.
00-CV-71438-DT

vs.

JOHN ENGLER, et al.

HON. BERNARD A. FRIEDMAN

Defendants,

and

MICHIGAN BEER AND WINE WHOLESALERS ASSOCIATION,

Intervening Defendant.

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Dept of Attorney General
LCC Division-Lansing

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### OPINION AND ORDER DENYING DEFENDANTS' MOTION TO DISMISS, DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, AND GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter is presently before the court on cross motions for summary judgment. The issues have been fully briefed and the court has heard oral argument. For the reasons stated below, the court shall grant defendants' motion and deny plaintiffs' motion.

The plaintiffs in this case are Michigan residents who are wine connoisseurs, wine journalists, and wine collectors. One of the plaintiffs, Domaine Alfred, Inc., is a small California

winery that ships its wines to customers in other states. The defendants are Michigan's governor, Michigan's attorney general, and the chair of Michigan's Liquor Control Commission. The Michigan Beer and Wine Wholesalers Association has intervened as a defendant. In addition, amicus briefs have been filed by the Michigan Interfaith Council on Alcohol Problems and by a collection of Michigan public universities, both of which support the defendants' position.

Plaintiffs have brought this action to challenge an aspect of Michigan's alcohol distribution system. Under Michigan's long-established "three-tier system," consumers must purchase alcoholic beverages from licensed retailers; retailers must purchase them from licensed wholesalers; and wholesalers must purchase them from licensed manufacturers. In one form or another, the three-tier distribution system is in place in most states. See *Bainbridge v. Bush*, 148 F. Supp. 2d 1306, 1308 (M.D. Fla. 2001); Vijay Shanker, *Alcohol Direct Shipment Laws*, 85 Va. L. Rev. 353, 355 (1999).

Plaintiffs challenge the provision of Michigan's alcohol distribution system that generally prohibits manufacturers of alcoholic beverages from shipping their products directly to Michigan consumers. Plaintiffs note that Michigan law makes an exception for Michigan wineries, which may ship their wines directly to Michigan consumers. No such exception is made for out-of-state wineries, which are required to sell their wines through Michigan wholesalers.[1]

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[1] This distinction between in-state and out-of-state wineries is not directly apparent from the statutory framework. However, it can be gleaned from various Michigan Liquor Control Commission regulations, which are codified within the Michigan Administrative Code. R436.1057 states that "[a] person shall not deliver, ship, or transport into this state beer, wine, or spirits without a license authorizing such action, ..." The only applicable license, an "out of state seller of wine licence [sic]," may according to R436.1705(2)(d) be obtained by a "manufacturer which is

Plaintiffs argue that this statutory scheme discriminates against out-of-state wineries, and interferes with the free flow of commerce, in violation of the dormant Commerce Clause.[2] Plaintiffs allege that this discrimination puts out-of-state wineries at a competitive disadvantage because they must incur the expense of channeling their wines through wholesalers and retailers, whereas in-state wineries may act as retailers and sell directly to Michigan consumers. Plaintiffs contend many small out-of-state wineries, which either cannot afford or choose not to pay this additional expense, are effectively excluded from the Michigan market. This, it is alleged, harms both the out-of-state wineries and the Michigan consumers interested in purchasing their wines. Additionally, plaintiffs Ray and Eleanor Heald allege that their ability to carry out their profession as wine journalists and wine critics is hampered by their inability to obtain many

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located outside of this state, but in the United States, and which produces and bottles its own wine." However, under R436.1719(4) the holder of such a license may ship wine "only to a licensed wholesaler at the address of the licensed premises except upon written order of the commission." In answers to interrogatories, a representative of the Michigan Liquor Control Commission indicates that "[a]t present, there is no procedure whereby an out-of-state retailer or winery can obtain a license or approval to deliver wine directly to Michigan residents." See defendant Stewart's answers to interrogatories, Answer 16.

In contrast, the Michigan Liquor Control Commission indicates that the "ability to deliver wine to the consumer is available to winemakers licensed in Michigan, inasmuch as under the provisions of MCL 436.1113(9) these licensees are permitted to sell at retail the wines they manufacture ... A licensed Michigan winemaker may deliver their [sic] own products to customers without an SDM [specially designated merchant] license." *Id.* Answer 8.

[2] Article I § 8 cl. 3 of the United States Constitution grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; ..." The Supreme Court "long has recognized that this affirmative grant of authority to Congress also encompasses an implicit or 'dormant' limitation on the authority of the States to enact legislation affecting interstate commerce." *Healy v. The Beer Institute*, 491 U.S. 324, 326 n.1 (1989).

wines produced by out-of-state wineries. For relief, they seek a declaratory judgment that it is unconstitutional for Michigan to prohibit out-of-state wineries from shipping wine directly to Michigan residents.

Defendants contend that Michigan's three-tier distribution system, and its different treatment of out-of-state and in-state wineries, are authorized under § 2 of the 21st Amendment.[3] Defendants argue that Michigan has a legitimate interest in ensuring that all wine sales, whether from in-state or out-of-state wineries, is carefully regulated. Defendants assert the present system ensures that all applicable taxes are collected and that minors do not have direct access to alcohol. Defendants further assert that Michigan wineries may act as retailers because they are subjected to extensive licensing requirements which cannot be applied, or practicably enforced, as to out-of-state wineries.

Defendants first argue that plaintiffs' complaint should be dismissed because plaintiffs lack standing to sue. This argument is easily disposed of. Standing is established by a showing of injury in fact, causation and redressability. See *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992). In this case, plaintiffs have established each element. Plaintiffs' inability to obtain, or to sell, the wines they desire is a cognizable injury. The injury is caused by Michigan's prohibition of direct sales by out-of-state wineries to Michigan consumers. And the injury would be redressed by a ruling in plaintiffs' favor. Plaintiffs clearly have standing to assert this claim. See *Bridenbaugh,* 227 F.3d 849-50.

Defendants also argue that the court lacks jurisdiction over this matter under the Tax Injunction Act, 28 U.S.C. §

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[3] U.S. Const. Amend. XXI, § 2 states: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

1341, which states that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law ...." This statute "prohibits a federal district court, in most circumstances, from issuing an injunction enjoining the collection of state taxes ... [and] from issuing a declaratory judgment holding state tax laws unconstitutional." *California v. Grace Brethren Church,* 457 U.S. 393, 408 (1982). This statute does not apply in this case. Plaintiffs do not seek a declaration enjoining the collection of any state tax; they seek a declaration that Michigan's direct shipment law is unconstitutional. Plaintiffs have specifically indicated they are willing and able to pay any and all applicable taxes. The motion to dismiss the complaint for lack of subject matter jurisdiction on these grounds must be denied.

While the case law concerning direct shipment laws is sparse, the more persuasive decisions have found such laws to be constitutional.[4] In *House of York, Ltd. v. Ring.*, 322 F. Supp. 530 (S.D.N.Y. 1970), plaintiff was a Delaware beverage distributor that challenged a New York statute prohibiting the direct shipment of alcoholic beverages to New York residents. Among other things, plaintiff argued that the statute violated the Commerce Clause. In rejecting this argument, the court stated:

> A series of decisions by the Supreme Court rendered shortly after the ratification of [the 21st Amendment] made it abundantly clear that the states were considered to have acquired plenary authority

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[4] The court is aware of three contrary district court decisions. See *Bridenbaugh v. O'Bannon*, 78 F. Supp. 2d 828 (N.D. Ind. 1999), *rev'd Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000); *Swedenburg v. Kelly*, 2000 WL 1264285 (S.D.N.Y. 2000) (unpublished decision denying a Rule 12(b)(6) motion to dismiss); and *Dickerson v. Bailey*, 87 F. Supp. 691 (S.D. Tex. 2000) (granting summary judgment for plaintiffs where state statute prohibited direct shipment and personal importation of more than three gallons of wine).

> to deal with intoxicating beverages after importation ... [W]hile it is clear that the twenty-first amendment does not abrogate the Commerce Clause, the states have wide latitude in regulating liquors coming into, rather than through, the state, and such latitude encompasses the statute now before us.

*Id.* at 533, 535.

In *Bainbridge v. Bush,* 148 F. Supp. 2d 1306 (M.D. Fla. 2001), plaintiffs challenged Florida's direct shipment law. In all relevant respects, the statutory scheme at issue in *Bainbridge* is identical to Michigan's. Just as in Michigan, the Florida statute permits a Florida winery to obtain a vendor's license and to sell its products directly to Florida residents; however, such a license is not available to out-of-state wineries, which must incur the additional expense of selling their products through the three-tier distribution system. The court noted that this scheme "has the practical effect of preventing many small wineries from selling their wine in Florida ... because it is not cost-effective for the smaller out-of-state wineries to acquire a Florida wholesaler." *Id.* at 1311 n.7. The court found that the Florida statute violated the Commerce Clause because it "directly discriminates against out-of-state retailers and nondiscriminatory alternatives are available to serve the legitimate state interests ...." *Id.* at 1312.

Nonetheless, the court rejected plaintiffs' constitutional challenge and found the statute to be valid under § 2 of the 21st Amendment. The court noted that in a series of decisions the Supreme Court has indicated that under this amendment states have "virtually complete control" over the importation and distribution of alcohol; that state liquor statutes are presumptively valid; and that the three-tier distribution system is "unquestionably legitimate." *Id.* at 1310-1312, quoting *North Dakota v. United States*, 495 U.S. 423, 431-32 (1990). While state liquor control laws are not immune from scrutiny, they generally are upheld so long as they implicate

"'core concerns' of the twenty-first amendment, including temperance, raising revenue and 'ensuring orderly market conditions.'" *Id.* at 1313, quoting *North Dakota*, 495 U.S. at 432. The court found that the Florida statute met this test, as it sought to address "a serious threat to the public health, safety, and welfare; to state revenue collections; and to the economy of the state." *Id.* at 1308, quoting Fla. Stat. § 561.545 (legislative findings). The court concluded by stating:

> [T]he discriminatory nature of Florida's statutory scheme, when considered from the perspective of out-of-state wineries, violates the dormant commerce clause. However, because the Florida statutory scheme implicates the "core concerns" of the Twenty-First Amendment, it is a valid exercise of Florida's power even as applied to out-of-state wineries. ... In this regard, the numerous interests promoted by the Florida statutory scheme, including temperance, revenue protection, and the reduction of diversion and bootlegging, outweigh the minimal burden placed on interstate commerce.

*Id.* at 1315.

In *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000), the Seventh Circuit reversed a district court decision finding an Indiana direct shipment statute unconstitutional. In *Bridenbaugh*, as in the present case, plaintiffs were wine collectors and connoisseurs, who complained that the direct shipment statute prevented them from obtaining wine from small out-of-state wineries which could not afford to, or chose not to, sell their products through the three-tier distribution system. Plaintiff Bridenbaugh, like the Healds in the present case, also alleged that the direct shipment statute interfered with his ability to engage in his profession as a wine critic.

The district court found that the statute was unconstitutional because it violated the Commerce Clause by discriminating against out-of-state wineries in favor of in-state wineries. The district court further found that the statute did not promote temperance and that, therefore, the statute was not a proper exercise of power under the 21st Amendment. See *Id.* at 831 & 832 n.4 ("[T]emperance is the core purpose of the Twenty-First Amendment"; "[t]emperance is not the issue in the case now before this Court").

On appeal, the Seventh Circuit noted that the Indiana statute would be invalid under the Commerce Clause if it were directed at any consumer product other than alcoholic beverages. See *Bridenbaugh v. Freeman-Wilson,* 227 F.3d 848, 851 (7th Cir. 2000). The court also agreed that the statute "is hard to justify as a temperance measure." *Id.* Nonetheless, the appeals court reversed the judgment of the district court because the Indiana direct shipment law was a valid exercise of state authority under § 2 of the 21st Amendment. The court stated:

> Indiana Code § 7.1-5-11-1.5(a), like the statute in Bowman, regulates importation. And the shipments it regulates, direct shipments to consumers, are precisely the sort that prompted the Webb-Kenyon Act, the forefather of § 2. Section 2 thus authorizes I.C. § 7.1-5-11-1.5(a) unless the state has used its power to impose a discriminatory condition on importation, one that favors Indiana sources of alcoholic beverages over sources in other states, as Hawaii did in Bacchus. Plaintiffs contend that § 7.1-5-11-1.5(a) discriminates in this fashion, but we do not see how. Indiana insists that every drop of liquor pass through its three-tiered system and be subjected to taxation. Wine originating in California, France, Australia, or Indiana passes through the same three

> tiers and is subjected to the same taxes. Where's the functional discrimination?

*Id.* at 853. The court acknowledged that Indiana wineries are permitted to ship their wines directly to Indiana consumers, whereas out-of-state wineries are required to sell their wines through licensed wholesalers and retailers. See *Id.* at 851. However, the court rejected plaintiffs' contention that this scheme discriminates unfairly against out-of-state wineries. Noting that the 21st Amendment "empowers Indiana to control alcohol in ways that it cannot control cheese," the court found that the direct shipment law "channels [out-of-state] sales through Indiana permit-holders, enabling Indiana to collect its excise tax equally from in-state and out-of-state sellers. As the history of the twenty-first amendment confirms, this is precisely what § 2 is for." *Id.* at 851, 854.

The court believes that the decisions in *House of York*, *Bridenbaugh* and *Bainbridge* correctly concluded that direct shipment laws are a permissible exercise of state power under § 2 of the 21st Amendment. While the dormant Commerce Clause would prohibit states from burdening interstate commerce by applying such laws to any other products, the 21st Amendment directly authorizes the states "to control alcohol in ways that it cannot control cheese." *Bridenbaugh*, 227 F.3d at 851. The Supreme Court has specifically upheld the three-tier distribution system and has stated more than once that "within the area of its jurisdiction, the State has 'virtually complete control' over the importation and sale of liquor and the structure of the liquor distribution system." *North Dakota v. United States*, 495 U.S. 423, 431 (1990), citing *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). See also *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 584-85 (1986) (noting that while the 21st Amendment does not authorize a state to regulate liquor sales in other states, the amendment does give states "wide latitude to regulate the importation and distribution of

liquor within their territories"); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984) (noting that § 2 "reserves to the States power to impose burdens on interstate commerce in intoxicating liquor that, absent the Amendment, would clearly be invalid under the Commerce Clause"). The control is "virtually complete," and not "complete," because a state's actions under the 21st Amendment must further "core" concerns of that Amendment -- namely, "the interest of promoting temperance, ensuring orderly market conditions, and raising revenue." *North Dakota*, 495 U.S. at 432. These interests are not furthered -- and the 21st Amendment will not deflect a Commerce Clause challenge -- when, for example, a state exempts locally produced alcoholic beverages from a generally applicable liquor excise tax, thereby engaging in "mere economic protectionism." *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). The Supreme Court has invalidated other state statutes as well, when the burden on interstate commerce is not justified by "core" 21st Amendment concerns. See *Healy v. The Beer Institute*, 491 U.S. 324 (1989) (invalidating price affirmation statute); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986) (same); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964) (invalidating prohibition of liquor sales to departing international airline travelers).

The court is persuaded that Michigan's direct shipment law is a permitted exercise of state power under § 2 of the 21st Amendment. The measure cannot be characterized as "mere economic protectionism." The direct shipment law is one provision of a comprehensive system that regulates the flow of all alcoholic beverages into and within the State of Michigan. Out-of-state wineries are not prohibited from selling their products in Michigan; they simply must do so in a manner prescribed by Michigan's statutory scheme -- namely, by going through a licensed wholesaler. The Michigan Legislature has chosen this path to ensure the

collection of taxes from out-of-state wine manufacturers and to reduce the risk of alcohol falling into the hands of minors. The 21st Amendment gives it the power to do so.

For the reasons stated above,

IT IS ORDERED that plaintiffs' motion for summary judgment is denied.

IT IS FURTHER ORDERED that plaintiffs' requests for injunctive and declaratory relief are denied.

IT IS FURTHER ORDERED that defendants' motions to dismiss or for summary judgment due to lack of standing or for lack of subject matter jurisdiction are denied.

IT IS FURTHER ORDERED that defendants' motions for summary judgment on the merits are granted.

IT IS FURTHER ORDERED that the remaining motions are denied as moot.

S/S

BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE

Dated: 28 SEP 2001
Detroit, Michigan

## APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ELEANOR HEALD, et al.,

Plaintiffs,

Civil Action No.
00-CV-71438-DT

vs.

JOHN ENGLER, et al.

HON. BERNARD A. FRIEDMAN

Defendants,

and

MICHIGAN BEER AND WINE WHOLESALERS ASSOCIATION,

_____/

## JUDGMENT

The court has granted defendants' motion for summary judgment and denied plaintiffs' motion for summary judgment. Accordingly,

IT IS ORDERED AND ADJUDGED that judgment be and is hereby granted for defendants and against plaintiffs. Costs to be permitted in accordance with law.

DAVID J. WEAVER
CLERK OF THE COURT

By: S/S
Deputy Clerk

Approved:

S/S
BERNARD A. FRIEDMAN
U.S. DISTRICT JUDGE

28 SEP 2001

## APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ELEANOR HEALD, et al.,

Plaintiffs,

Civil Action No.
00-CV-71438-DT

vs.

JOHN ENGLER, et al.

HON. BERNARD A. FRIEDMAN

Defendants,

and

MICHIGAN BEER AND WINE WHOLESALERS ASSOCIATION,

Intervening Defendant.
_____/

## ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION

This matter is presently before the court on plaintiffs' motion for reconsideration of the court's opinion and order granting summary judgment for defendants. The motion is denied because plaintiffs have not "demonstrate[d] a palpable defect by which the court and the parties have been misled [and] . . . that correcting the defect will result in a different disposition of the case." E.D. Mich. LR 7.1(g)(3).

The bottom line in this case is that the 21st Amendment authorizes states to regulate the flow of alcohol within their borders. The three-tier distribution system is a proper exercise of that constitutional authority, despite the fact that such a system places a minor burden on interstate commerce.

The court did not address the parties' cross motions to strike various affidavits and other evidence because the court did not consider the challenged evidence in deciding the summary judgment motions. In effect, the court denied the cross motions to strike as moot. This case turns on largely legal questions, not factual disputes. Accordingly,

IT IS ORDERED that plaintiffs' motion for reconsideration is denied.

S/S
BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE

Dated: NOV 05 2001
Detroit, Michigan

## APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ELEANOR HEALD, et al.,
Plaintiffs,

Civil Action No.
00-CV-71438-DT

vs.

JOHN ENGLER, et al.

HON. BERNARD A. FRIEDMAN

Defendants,

and

MICHIGAN BEER AND WINE WHOLESALERS ASSOCIATION,
Intervening Defendant.
_____/

**JUDGMENT**

In accordance with the Sixth Circuit's order of remand dated August 28, 2003,

IT IS ORDERED AND ADJUDGED that judgment be and is hereby granted for plaintiffs and against defendants. Costs to be permitted in accordance with law.

DAVID J. WEAVER
CLERK OF COURT

By: S/S..
Deputy Clerk

Approved:_____
BERNARD A. FRIEDMAN
U.S. DISTRICT JUDGE
SEP 05 2003

## APPENDIX I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ELEANOR HEALD, et al.,
Plaintiffs,

Civil Action No.
00-CV-71438-DT

vs.

JOHN ENGLER, et al.

HON. BERNARD A. FRIEDMAN

Defendants,

and

MICHIGAN BEER AND WINE WHOLESALERS ASSOCIATION,

Intervening Defendant.
_____/

ORDER GRANTING DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT

Defendant has filed a motion, in which intervening defendant joins, requesting that the court vacate its September 5, 2003, judgment. Defendant correctly notes that the judgment was filed before the court of appeals' mandate was issued. Accordingly,

IT IS ORDERED that defendant's motion for relief from judgment is granted, and the court's September 5, 2003, judgment is vacated.

S/S
BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE

Dated: Sep 24 2003
Detroit, Michigan

# APPENDIX J

# CONSTITUTIONAL AND STATUTORY PROVISIONS

## United States Constitution

### Article I, Section 8

The Congress shall have Power

* * *

To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes;

* * *

### Amendment XXI

**Section 1.** The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

**Section 2.** The transportation or importation into any State, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

**Section 3.** This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

## 27 U.S.C. 122

**The Webb-Kenyon Act provides:**

### § 122. Shipments into States for possession or sale in violation of State law

The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited.

## MICHIGAN COMPILED LAWS

**436.1111 Definitions; P to S.**

Sec. 111. (1) "Person" means an individual, firm, partnership, limited partnership, association, limited liability company, or corporation.

(2) "Primary source of supply" means, in the case of domestic spirits, the distiller, producer, owner of the commodity at the time it becomes a marketable product, or bottler, or the exclusive agent of any such person and, in the case of spirits imported into the United States, either the foreign distiller, producer, owner of the bottler, or the prime importer for, or the exclusive agent in the United States of, the foreign distiller, producer, owner, or the bottler.

(3) "Professional account" means an account established for a person by a class C licensee or tavern licensee whose major business is the sale of food, by which the licensee extends credit to the person for not more than 30 days.

(4) "Residence" means the premises in which a person resides permanently.

(5) "Retailer" means a person licensed by the commission who sells to the consumer in accordance with rules promulgated by the commission.

(6) "Sacramental wine" means wine containing not more than 24% of alcohol by volume which is used for sacramental purposes.

(7) "Sale" includes the exchange, barter, traffic, furnishing, or giving away of alcoholic liquor. In the case of a sale in which a shipment or delivery of alcoholic liquor is made by a common or other carrier, the sale of the alcoholic liquor is considered to be made in the county within which the delivery of the alcoholic liquor is made by that carrier to the consignee or his or her agent or employee, and venue for the prosecution for that sale may be in the county or city

where the seller resides or from which the shipment is made or at the place of delivery.

(8) "School" includes buildings used for school purposes to provide instruction to children in grades kindergarten through 12, when that instruction is provided by a public, private, denominational, or parochial school, except those buildings used primarily for adult education or college extension courses. School does not include a proprietary trade or occupational school.

(9) "Small wine maker" means a wine maker manufacturing or bottling not more than 50,000 gallons of wine in 1 calendar year.

(10) "Special license" means a contract between the commission and the special licensee granting authority to that licensee to sell beer, wine, mixed spirit drink, or spirits. The license shall be granted only to such persons and such organization and for such period of time as the commission shall determine so long as the person or organization is able to demonstrate an existence separate from an affiliated umbrella organization. If such an existence is demonstrated, the commission shall not deny a special license solely by the applicant's affiliation with an organization that is also eligible for a special license.

(11) "Specially designated distributor" means a person engaged in an established business licensed by the commission to distribute spirits and mixed spirit drink in the original package for the commission for consumption off the premises.

(12) "Specially designated merchant" means a person to whom the commission grants a license to sell beer or wine, or both, at retail for consumption off the licensed premises.

(13) "Spirits" means a beverage that contains alcohol obtained by distillation, mixed with potable water or other substances, or both, in solution, and includes wine containing

an alcoholic content of more than 21% by volume, except sacramental wine and mixed spirit drink.

(14) "State liquor store" means a store established by the commission under this act for the sale of spirits in the original package for consumption off the premises.

(15) "Supplier of spirits" means a vendor of spirits, a manufacturer of spirits, or a primary source of supply.

**436.1113 Definitions; T to W.**

Sec. 113. (1) "Tavern" means any place licensed to sell at retail beer and wine for consumption on the premises only.

(2) "Vehicle" means any means of transportation by land, by water, or by air.

(3) "Vendor" means a person licensed by the commission to sell alcoholic liquor.

(4) "Vendor of spirits" means a person selling spirits to the commission.

(5) "Warehouse" means a premises or place primarily constructed, used, or provided with facilities for the storage in transit or other temporary storage of perishable goods or for the conduct of a warehousing business, or for both.

(6) "Warehouser" means a licensee authorized by the commission to store alcoholic beverages, but prohibited from making sales or deliveries to retailers unless the licensee is also the holder of a wholesaler or manufacturer license issued by the commission.

(7) "Wholesaler" means a person who sells beer, wine, or mixed spirit drink only to retailers or other licensees, and who sells sacramental wine as provided in section 301.

(8) "Wine" means the product made by the normal alcoholic fermentation of the juice of sound, ripe grapes, or any other fruit with the usual cellar treatment, and containing not more than 21% of alcohol by volume, including fermented fruit juices other than grapes and mixed wine drinks.

(9) "Wine maker" means any person licensed by the commission to manufacture wine and sell, at wholesale or retail, wine manufactured by that person.

**436.1203 Sale, delivery, or importation of alcoholic liquor; original purchase and importation into state of spirits for sale, use, storage, or distribution; requirements; exceptions.**

Sec. 203. (1) Except as provided in this section and section 301, a sale, delivery, or importation of alcoholic liquor, including alcoholic liquor for personal use, shall not be made in this state unless the sale, delivery, or importation is made by the commission, the commission's authorized agent or distributor, an authorized distribution agent approved by order of the commission, a person licensed by the commission, or by prior written order of the commission.

(2) For purposes of subsection (1), the sale, delivery, or importation of alcoholic liquor includes, but is not limited to, the sale, delivery, or importation of alcoholic liquor transacted or caused to be transacted by means of any mail order, internet, telephone, computer, device, or other electronic means. Subject to subsection (3), if a retail sale, delivery, or importation of alcoholic liquor occurs by any such means, the retailer must comply with all of the following:

(a) Be appropriately licensed under the laws of this state.

(b) Pay any applicable taxes to the commission.

(c) Comply with all prohibitions of the laws of this state including, but not limited to, sales to minors.

(d) Verify the age of the individual placing the order by obtaining from him or her an affirmation that he or she is of legal age to purchase alcoholic liquor. The person receiving and accepting the order shall record the name, address, date of birth, and telephone number of the person placing the order on the order form or other verifiable record of a type and generated in a manner approved by the commission.

(e) Upon request of the commission, make available to the commission any document used to verify the age of the individual ordering the alcoholic liquor from the retail seller.

(f) Stamp, print, or label on the outside of the shipping container language that clearly establishes in a prominent fashion that the package contains alcoholic liquor and that the recipient at the time of the delivery is required to provide identification verifying his or her age along with a signature.

(g) Place a label on the top panel of the shipping container containing the name and address of the individual placing the order and the name of the designated recipient, if any.

(3) Notwithstanding subsection (2), in the case of a retail sale, delivery, or importation of alcoholic liquor occurring by any means described in subsection (2), a person taking the order on behalf of the retailer must comply with subsection (2)(c) through (g).

(4) The person who delivers the alcoholic liquor shall verify that the individual accepting delivery is of legal age and is either the individual who placed the order or the designated recipient residing at the same address or is otherwise authorized through a rule promulgated under this act by the commission to receive alcoholic liquor under this section. If the delivery person, after a diligent inquiry, determines that the purchaser or designated recipient is not of legal age, the delivery person shall return the alcoholic liquor to the retailer. A delivery person who returns alcoholic liquor to the retailer due to inability to obtain the purchaser's or designated recipient's legal age is not liable for any damages suffered by the purchaser or retailer.

(5) All spirits for sale, use, storage, or distribution in this state, shall originally be purchased by and imported into the state by the commission, or by prior written authority of the commission.

(6) This section does not apply in the case of an alcoholic liquor brought into this state for personal or household use in an amount permitted by federal law by a person of legal age to purchase alcoholic liquor at the time of reentry into this state from without the territorial limits of the United States if the person has been outside the territorial limits of the United States for more than 48 hours and has not brought alcoholic liquor into the United States during the preceding 30 days.

(7) A person who is of legal age to purchase alcoholic liquor may do either of the following in relation to alcoholic liquor that contains less than 21% alcohol by volume.

(a) Personally transport from another state, once in a 24-hour period, not more than 312 ounces of alcoholic liquor for that person's personal use, notwithstanding subsection (1).

(b) Ship or import from another state alcoholic liquor for that person's personal use so long as that personal importation is done in compliance with subsection (1).

(8) As used in this section:

(a) "Computer" means any connected, directly interoperable or interactive device, equipment, or facility that uses a computer program or other instructions to perform specific operations including logical, arithmetic, or memory functions with or on computer data or a computer program and that can store, retrieve, alter, or communicate the results of the operations to a person, computer program, computer, computer system, or computer network.

(b) "Computer network" means the interconnection of hardwire or wireless communication lines with a computer through remote terminals, or a complex consisting of 2 or more interconnected computers.

(c) "Computer program" means a series of internal or external instructions communicated in a form acceptable to a computer that directs the functioning of a computer, computer system, or computer network in a manner designed

to provide or produce products or results from the computer, computer system, or computer network.

(d) "Computer system" means a set of related, connected or unconnected, computer equipment, devices, software, or hardware.

(e) "Device" includes, but is not limited to, an electronic, magnetic, electrochemical, biochemical, hydraulic, optical, or organic object that performs input, output, or storage functions by the manipulation of electronic, magnetic, or other impulses.

(f) "Diligent inquiry" means a diligent good faith effort to determine the age of a person, which includes at least an examination of an official Michigan operator's or chauffeur's license, an official Michigan personal identification card, or any other bona fide picture identification which establishes the identify and age of the person.

**436.1537 Classes of vendors permitted to sell alcoholic liquors at retail; sale of wine by wine maker; wine tastings.**

Sec. 537. (1) The following classes of vendors may sell alcoholic liquors at retail as provided in this section:

(a) Taverns where beer and wine may be sold for consumption on the premises only.

(b) Class C license where beer, wine, mixed spirit drink, and spirits may be sold for consumption on the premises.

(c) Clubs where beer, wine, mixed spirit drink, and spirits may be sold for consumption on the premises only to bona fide members where consumption is limited to these members and their bona fide guests, who have attained the age of 21 years.

(d) Hotels of class A where beer and wine may be sold for consumption on the premises and in the rooms of bona fide registered guests. Hotels of class B where beer, wine, mixed spirit drink, and spirits may be sold for consumption

on the premises and in the rooms of bona fide registered guests.

(e) Specially designated merchants, where beer and wine may be sold for consumption off the premises only.

(f) Specially designated distributors where spirits and mixed spirit drink may be sold for consumption off the premises only.

(g) Special licenses where beer and wine or beer, wine, mixed spirit drink, and spirits may be sold for consumption on the premises only.

(h) Dining cars or other railroad or Pullman cars, watercraft, or aircraft, where alcoholic liquor may be sold for consumption on the premises only, subject to rules promulgated by the commission.

(i) Brewpubs where beer manufactured on the premises by the licensee may be sold for consumption on or off the premises by any of the following licensees:

(i) Class C.

(ii) Tavern.

(iii) Class A hotel.

(iv) Class B hotel.

(j) Micro brewers where beer produced by the micro brewer may be sold to a consumer for consumption on or off the brewery premises.

(k) Class G-1 license where beer, wine, mixed spirit drink, and spirits may be sold for consumption on the premises only to members required to pay an annual membership fee and consumption is limited to these members and their bona fide guests.

(l) Class G-2 license where beer and wine may be sold for consumption on the premises only to members required to pay an annual membership fee and consumption is limited to these members and their bona fide guests.

(2) A wine maker may sell wine made by that wine maker in a restaurant for consumption on or off the premises if the restaurant is owned by the wine maker or operated by another person under an agreement approved by the commission and located on the premises where the wine maker is licensed.

(3) A wine maker, with the prior written approval of the commission, may conduct wine tastings of wines made by that wine maker and may sell the wine made by that wine maker for consumption off the premises at a location other than the premises where the wine maker is licensed to manufacture wine, under the following conditions:

(a) The premises upon which the wine tasting occurs conforms to local and state sanitation requirements.

(b) Payment of a $100.00 fee per location is made to the commission.

(c) The wine tasting locations shall be considered licensed premises.

(d) Wine tasting does not take place between the hours of 2 a.m. and 7 a.m. Monday through Saturday, or between 2 a.m. and 12 noon on Sunday.

(e) The premises and the licensee comply with and are subject to all applicable rules promulgated by the commission.

**436.1701 Selling or furnishing alcoholic liquor to person less than 21 years of age; failure to make diligent inquiry; misdemeanor; signs; consumption of alcoholic liquor as cause of death or injury; felony; enforcement against licensee; consent of parent or guardian in undercover operation; defense in action for violation; report; definitions.**

Sec. 701. (1) Alcoholic liquor shall not be sold or furnished to a minor. Except as otherwise provided in subsection (2) and subject to subsections (4), (5), and (6), a

person who knowingly sells or furnishes alcoholic liquor to a minor, or who fails to make diligent inquiry as to whether the person is a minor, is guilty of a misdemeanor. A retail licensee or a retail licensee's clerk, agent, or employee who violates this subsection shall be punished in the manner provided for licensees in section 909, except that if the violation is the result of an undercover operation in which the minor received alcoholic liquor under the direction of the state police, the commission, or a local police agency as part of an enforcement action, the retail licensee's clerk, agent, or employee is responsible for a state civil infraction and may be ordered to pay a civil fine of not more than $100.00. Except as otherwise provided in subsection (2), a person who is not a retail licensee or a retail licensee's clerk, agent, or employee and who violates this subsection is guilty of a misdemeanor punishable by a fine of not more than $1,000.00 and imprisonment for not more than 60 days for a first offense, a fine of not more than $2,500.00 and imprisonment for not more than 90 days for a second or subsequent offense, and may be ordered to perform community service. A suitable sign describing the content of this section and the penalties for its violation shall be posted in a conspicuous place in each room where alcoholic liquor is sold. The signs shall be approved and furnished by the commission.

(2) A person who is not a retail licensee or the retail licensee's clerk, agent, or employee and who violates subsection (1) is guilty of a felony, punishable by imprisonment for not more than 10 years or a fine of not more than $5,000.00, or both, if the subsequent consumption of the alcoholic liquor by the minor is a direct and substantial cause of that person's death or an accidental injury that causes that person's death.

(3) If a violation occurs in an establishment that is licensed by the commission for consumption of alcoholic liquor on the licensed premises, a person who is a licensee or

the clerk, agent, or employee of a licensee shall not be charged with a violation of subsection (1) or section 801(2) unless the licensee or the clerk, agent, or employee of the licensee knew or should have reasonably known with the exercise of due diligence that a person less than 21 years of age possessed or consumed alcoholic liquor on the licensed premises and the licensee or clerk, agent, or employee of the licensee failed to take immediate corrective action.

(4) If the enforcing agency involved in the violation is the state police or a local police agency, a licensee shall not be charged with a violation of subsection (1) or section 801(2) unless all of the following occur, if applicable:

(a) Enforcement action is taken against the minor who purchased or attempted to purchase, consumed or attempted to consume, or possessed or attempted to possess alcoholic liquor.

(b) Enforcement action is taken under this section against the person 21 years of age or older who is not the retail licensee or the retail licensee's clerk, agent, or employee who sold or furnished the alcoholic liquor to the minor.

(c) Enforcement action under this section is taken against the clerk, agent, or employee who directly sold or furnished alcoholic liquor to the minor.

(5) If the enforcing agency is the commission and an appearance ticket or civil infraction citation has not been issued, then the commission shall recommend to a local law enforcement agency that enforcement action be taken against a violator of this section or section 703 who is not a licensee. However, subsection (4) does not apply if the minor against whom enforcement action is taken under section 703, the clerk, agent, or employee of the licensee who directly sold or furnished alcoholic liquor to the minor, or the person 21 years of age or older who sold or furnished alcoholic liquor to the minor is not alive or is not present in this state at the

time the licensee is charged. Subsection (4)(a) does not apply under either of the following circumstances:

(a) The violation of subsection (1) is the result of an undercover operation in which the minor purchased or received alcoholic liquor under the direction of the person's employer and with the prior approval of the local prosecutor's office as part of an employer-sponsored internal enforcement action.

(b) The violation of subsection (1) is the result of an undercover operation in which the minor purchased or received alcoholic liquor under the direction of the state police, the commission, or a local police agency as part of an enforcement action.

(6) Any initial or contemporaneous purchase or receipt of alcoholic liquor by the minor under subsection (5)(a) or (b) must have been under the direction of the state police, the commission, or the local police agency and must have been part of the undercover operation.

(7) If a minor participates in an undercover operation in which the minor is to purchase or receive alcoholic liquor under the supervision of a law enforcement agency, his or her parents or legal guardian shall consent to the participation if that person is less than 18 years of age.

(8) In an action for the violation of this section, proof that the defendant or the defendant's agent or employee demanded and was shown, before furnishing alcoholic liquor to a minor, a motor vehicle operator's or chauffeur's license or a registration certificate issued by the federal selective service, or other bona fide documentary evidence of the age and identity of that person, shall be a defense to an action brought under this section.

(9) The commission shall provide, on an annual basis, a written report to the department of state police as to the number of actions heard by the commission involving violations of this section and section 801(2). The report shall

include the disposition of each action and contain figures representing the following categories:

(a) Decoy operations.

(b) Off-premises violations.

(c) On-premises violations.

(d) Repeat offenses within the 3 years preceding the date of that report.

(10) As used in this section:

(a) "Corrective action" means action taken by a licensee or a clerk, agent, or employee of a licensee designed to prevent a minor from further possessing or consuming alcoholic liquor on the licensed premises. Corrective action includes, but is not limited to, contacting a law enforcement agency and ejecting the minor and any other person suspected of aiding and abetting the minor.

(b) "Diligent inquiry" means a diligent good faith effort to determine the age of a person, which includes at least an examination of an official Michigan operator's or chauffeur's license, an official Michigan personal identification card, or any other bona fide picture identification which establishes the identity and age of the person.

**436.1801 Granting or renewal of license; surety; selling, furnishing, or giving alcoholic liquor to minor or to person visibly intoxicated; right of action for damage or personal injury; actual damages; institution of action; notice; survival of action; general reputation as evidence of relation; separate actions by parents; commencement of action against retail licensee; indemnification; defenses available to licensee; rebuttable presumption; prohibited causes of action; section as exclusive remedy for money damages against licensee; civil action subject to revised judicature act.**

Sec. 801. (1) Except as otherwise provided in this act, before the approval and granting, or renewal, of a license, the

following licensees or applicants for that license shall make, execute, and deliver to the commission a bond executed by a surety company authorized to do business in the state or, in the discretion of the commission, by approved personal surety running to the people of the state, in the following amounts:

(a) A manufacturer of beer, a manufacturer of wine, a mixed spirit drink manufacturer, an outstate seller of beer, an outstate seller of mixed spirit drink, and an outstate seller of wine, a bond in an amount equal to 1/12 of the total beer, mixed spirit drink, or wine excise taxes paid to the state in the last calendar year or a bond in the sum of $1,000.00, whichever is greater, for the faithful performance of the conditions of the license issued and for compliance with this act. A surety shall not cancel a bond issued under this subdivision except upon 30 days' written notice to the commission.

(b) A special license authorizing the sale of beer, mixed spirit drink, wine, or spirits for consumption on the premises, a bond in the sum of $1,000.00. A bond issued under this subdivision shall remain in effect for 60 days after the expiration of the special license. A bond is not required for a church or school.

(2) A retail licensee shall not directly, individually, or by a clerk, agent, or servant sell, furnish, or give alcoholic liquor to a minor except as otherwise provided in this act. A retail licensee shall not directly or indirectly, individually or by a clerk, agent, or servant sell, furnish, or give alcoholic liquor to a person who is visibly intoxicated.

(3) Except as otherwise provided in this section, an individual who suffers damage or who is personally injured by a minor or visibly intoxicated person by reason of the unlawful selling, giving, or furnishing of alcoholic liquor to the minor or visibly intoxicated person, if the unlawful sale is proven to be a proximate cause of the damage, injury, or death, or the spouse, child, parent, or guardian of that

individual, shall have a right of action in his or her name against the person who by selling, giving, or furnishing the alcoholic liquor has caused or contributed to the intoxication of the person or who has caused or contributed to the damage, injury, or death. In an action pursuant to this section, the plaintiff shall have the right to recover actual damages in a sum of not less than $50.00 in each case in which the court or jury determines that intoxication was a proximate cause of the damage, injury, or death.

(4) An action under this section shall be instituted within 2 years after the injury or death. A plaintiff seeking damages under this section shall give written notice to all defendants within 120 days after entering an attorney-client relationship for the purpose of pursuing a claim under this section. Failure to give written notice within the time specified shall be grounds for dismissal of a claim as to any defendants that did not receive that notice unless sufficient information for determining that a retail licensee might be liable under this section was not known and could not reasonably have been known within the 120 days. In the event of the death of either party, the right of action under this section shall survive to or against his or her personal representative. In each action by a husband, wife, child, or parent, the general reputation of the relation of husband and wife or parent and child shall be prima facie evidence of the relation, and the amount recovered by either the husband, wife, parent, or child shall be his or her sole and separate property. The damages, together with the costs of the action, shall be recovered in an action under this section. If the parents of the individual who suffered damage or who was personally injured are entitled to damages under this section, the father and mother may sue separately, but recovery by 1 is a bar to action by the other.

(5) An action under this section against a retail licensee shall not be commenced unless the minor or the alleged intoxicated person is a named defendant in the action and is

retained in the action until the litigation is concluded by trial or settlement.

(6) Any licensee subject to the provisions of subsection (3) regarding the unlawful selling, furnishing, or giving of alcoholic liquor to a visibly intoxicated person shall have the right to full indemnification from the alleged visibly intoxicated person for all damages awarded against the licensee.

(7) All defenses of the alleged visibly intoxicated person or the minor shall be available to the licensee. In an action alleging the unlawful sale of alcoholic liquor to a minor, proof that the defendant retail licensee or the defendant's agent or employee demanded and was shown a Michigan driver license or official state personal identification card, appearing to be genuine and showing that the minor was at least 21 years of age, shall be a defense to the action.

(8) There shall be a rebuttable presumption that a retail licensee, other than the retail licensee who last sold, gave, or furnished alcoholic liquor to the minor or the visibly intoxicated person, has not committed any act giving rise to a cause of action under subsection (3).

(9) The alleged visibly intoxicated person shall not have a cause of action pursuant to this section and a person shall not have a cause of action pursuant to this section for the loss of financial support, services, gifts, parental training, guidance, love, society, or companionship of the alleged visibly intoxicated person.

(10) This section provides the exclusive remedy for money damages against a licensee arising out of the selling, giving, or furnishing of alcoholic liquor.

(11) Except as otherwise provided for under this section and section 815, a civil action under subsection (3) against a retail licensee shall be subject to the revised judicature act of 1961, 1961 PA 236, MCL 600.101 to 600.9947.

**436.1903 Suspension or revocation of license; violation of act or rules; penalty; disposition; hearing; procedure; fee; right of appeal; institution of criminal prosecutions; defense; rules; appointment of agents to hear violation cases; authority and responsibility; ineligibility of designated agent for appointment to commission.**

Sec. 903. (1) The commission or any commissioner or duly authorized agent of the commission designated by the chairperson of the commission, upon due notice and proper hearing, may suspend or revoke any license upon a violation of this act or any of the rules promulgated by the commission under this act. The commission or any commissioner or duly authorized agent of the commission designated by the chairperson of the commission, may assess a penalty of not more than $300.00 for each violation of this act or rules promulgated under this act, or not more than $1,000.00 for each violation of section 801(2), in addition to or in lieu of revocation or suspension of the license, which penalty shall be paid to the commission and deposited with the state treasurer and shall be credited to the general fund of the state. The commission shall hold a hearing and order the suspension or revocation of a license if the licensee has been found liable for 3 or more separate violations of section 801(2) which violations occurred on different occasions within a 24-month period unless such violations for the sale, furnishing, or giving alcoholic liquor to a minor were discovered by the licensee and disclosed to an appropriate law enforcement agency immediately upon discovery.

(2) The commission shall provide a procedure by which a licensee who is aggrieved by any penalty imposed under subsection (1) and any suspension or revocation of a license ordered by the commission, a commissioner, or a duly authorized agent of the commission may request a hearing for the purpose of presenting any facts or reasons to the commission as to why the penalty, suspension, or revocation

should be modified or rescinded. Any such request shall be in writing and accompanied by a fee of $25.00. The commission, after reviewing the record made before a commissioner or a duly authorized agent of the commission, may allow or refuse to allow the hearing in accordance with the commission's rules. The right to a hearing provided in this subsection, however, shall not be interpreted by any court as curtailing, removing, or annulling the right of the commission to suspend or revoke licenses as provided for in this act. A licensee does not have a right of appeal from the final determination of the commission, except by leave of the circuit court. Notice of the order of suspension or revocation of a license or of the assessment of a penalty, or both, shall be given in the manner prescribed by the commission. The suspension or revocation of a license or the assessment of a penalty, or both, by the commission or a duly authorized agent of the commission does not prohibit the institution of a criminal prosecution for a violation of this act. The institution of a criminal prosecution for a violation of this act or the acquittal or conviction of a person for a violation of this act does not prevent the suspension or revocation of a license or the assessment of a penalty, or both, by the commission. In a hearing for the suspension or revocation of a license issued under this act, proof that the defendant licensee or an agent or employee of the licensee demanded and was shown, before furnishing any alcoholic liquor to a minor, a motor vehicle operator or chauffeur license or a registration certificate issued by the federal selective service, or other bona fide documentary evidence of majority and identity of the person, may be offered as evidence in a defense to a proceeding for the suspension or revocation of a license issued under this act. A licensee who has reason to believe that a minor has used fraudulent identification to purchase alcoholic liquor in violation of section 703 shall file a police report concerning the violation with a local law enforcement agency and shall also present the alleged

fraudulent identification to the local law enforcement agency at the time of filing the report if the identification is in the possession of the licensee. The commission may promulgate rules pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, regarding the utilization by licensees of equipment designed to detect altered or forged driver licenses, state identification cards, and other forms of identification.

(3) In addition to the hearing commissioners provided for in section 209, the chairperson of the commission may designate not more than 2 duly authorized agents to hear violation cases. A person appointed under this subsection shall be a member in good standing of the state bar of Michigan.

(4) A duly authorized agent who has been designated by the chairperson pursuant to subsection (3) shall have, in the hearing of violation cases, the same authority and responsibility as does a hearing commissioner under this act and the rules promulgated under this act.

(5) A duly authorized agent who has been designated by the chairperson pursuant to subsection (3) shall be ineligible for appointment to the commission for a period of 1 year after the person ceases to serve as a duly authorized agent.

**436.1909 Violation of act as misdemeanor; penalties; legislative intent.**

Sec. 909. (1) Except as otherwise provided in this act, a person, other than a person required to be licensed under this act, who violates this act is guilty of a misdemeanor.

(2) Except as otherwise provided in this act, a licensee who violates this act, or a rule or regulation promulgated under this act, is guilty of a misdemeanor punishable by imprisonment for not more than 6 months or a fine of not more than $500.00, or both.

(3) A person who performs any act for which a license is required under this act without first obtaining that license or

who sells alcoholic liquor in a county that has prohibited the sale of alcoholic liquor under section 1107 is guilty of a felony punishable by imprisonment for not more than 1 year or by a fine of not more than $1,000.00, or both.

(4) It is the intent of the legislature that the court, in imposing punishment under this section, should discriminate between casual or slight violations and habitual sales of alcoholic liquor or attempts to commercialize violations of this act or the rules or regulations promulgated under this act.

## MICHIGAN ADMINISTRATIVE CODE RULES

### R 436.1515 Sale and delivery of alcoholic liquor.

Rule 15. (1) An off-premise licensee who is licensed to sell beer and wine shall not take orders for the sale of beer or wine and have the delivery of the beer or wine made to the retail customer by a wholesaler, manufacturer of beer or wine, an outstate seller of beer or wine, or their licensed representatives or salesperson, without the prior written approval of the commission.

(2) An off-premise licensee who is licensed to sell spirits shall not knowingly allow the delivery of spirits to a retail customer by a licensed representative or salesperson, unless the licensed representative or salesperson is acting on behalf of the retail customer.

### R 436.1705 Outstate sellers of wine.

Rule 5. (1) A person shall be a holder of the required basic permit issued under the federal alcohol administration act, 27 U.S.C. S201 et seq., before being issued an outstate seller of wine license.

(2) An outstate seller of wine license may be issued to any of the following entities pursuant to these rules and the act:

(a) A person who is located in the United States, who imports foreign wine, and who sells this foreign wine in this state.

(b) A person who is located outside of this state, but in the United States, and who ships and sells bulk wine to licensed Michigan manufacturers for blending, rectifying, or nonbeverage purposes or bottled wine directly to a minister, priest, or rabbi for sacramental purposes.

(c) A person who is located outside of this state, but in the United States, and who bottles wine manufactured by another person. This person shall have a certificate or affidavit of identity from the manufacturer.

This licensed person shall be responsible for the quality of wine shipped into and sold in this state.

(d) A manufacturer which is located outside of this state, but in the United States, and which produces and bottles its own wine.

(e) A person who is located in the United States and who is designated by the manufacturer of wine as its sole and exclusive sales agent in the United States. A person who is issued an outstate seller of wine license under the provisions of this subdivision shall be responsible for the quality of wine shipped into and sold in this state.

(f) A person who is located in the United States and who purchases wine from a manufacturer of wine or brand owner located outside of this state, but in the United States, if the total amount of wine imported into this state that is manufactured by that outstate manufacturer of wine or brand owner is 150,000 liters or less per calendar year. The outstate seller shall be responsible for the quality of wine shipped into and sold in this state. A person who obtains an outstate seller of wine license pursuant to this subdivision, or who imports wine pursuant to this subdivision, and who holds a wholesale license shall pay cash at the time of purchase for importation.

**R 436.1719 Requirements for sale of bottled wine.**

Rule 19. (1) Bottled wine shall not be offered for sale, kept for sale, sold, delivered, or otherwise introduced into this state unless all of the following provisions have been complied with:

The wine is bottled, packaged, marked, branded, and labeled under these rules.

(b) The wine label truthfully describes the contents of the container in accordance with these rules and the federal wine regulations published in 27 C.F.R. part 4, subpart D, §§4.1 to 4.80, of 1935, as amended, which are adopted in these rules by reference. Copies of the adopted provisions

may be obtained from the Superintendent of Documents, United States Government Printing Office, Washington, DC 20402. The cost at the time of adoption of these rules is $49.00. Copies of these provisions may also be obtained from the Liquor Control Commission, Department of Consumer and Industry Services, Secondary Complex, 7150 Harris Drive, P.O. Box 30005, Lansing, Michigan 48909, at a cost of $55.00 each.

(c) The wine has received a registration number of approval from the commission.

(2) The commission reserves the right to disapprove any wine label submitted for registration that is deemed to 7promote violence, racism, sexism, intemperance or intoxication or to be detrimental to the health, safety, or welfare of the general public.

(3) Bottled wine shall not be shipped, delivered, or otherwise introduced into this state unless it is accompanied by an invoice, manifest, or other shipping document listing the quantity of bottled wine, by brand name and corresponding registration number of approval, that is being shipped, delivered, or introduced into this state.

(4) A manufacturer, rectifier, or outstate seller of wine who is responsible for labeling shall furnish proof, upon request, that valid certificates of approval for the label have been obtained from, and are unrevoked under, the federal labeling requirements as published in 27 C.F.R. part 4, subpart D, §§4.1 to 4.80, of 1935, as amended.

(5) A shipment of bottled wine from a manufacturer or an outstate seller of wine shall be made only to a licensed wholesaler at the address of the licensed premises, except upon written order of the commission.

(5) (4)

No. 03-1116 and No. 03-1120

Supreme Court, U.S.
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# In the Supreme Court of the United States

JENNIFER M. GRANHOLM, ET AL., PETITIONERS

*v.*

ELEANOR HEALD, ET AL.

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION, PETITIONER

*v.*

ELEANOR HEALD, ET AL.

*ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether a state law allowing in-state wineries to make direct shipments of wine to consumers, but barring out-of-state wineries from doing so, is discriminatory and therefore violates the Commerce Clause of the Constitution, notwithstanding section 2 of the Twenty-first Amendment.

## PARTIES TO THE PROCEEDINGS

The petitioners in No. 03-1116, who were defendants-appellees below and who are nominal respondents in No. 03-1120, are Jennifer M. Granholm, Governor of the State of Michigan; Michael A. Cox, Attorney General of the State of Michigan; and Nida R. Samona, Chairperson of the Michigan Liquor Control Commission.

The petitioner in No. 03-1120, which was an intervening defendant-appellee below and which is a nominal respondent in No. 03-1116, is the Michigan Beer and Wine Wholesalers Association.

Respondents in both No. 03-1116 and No. 03-1120, who were plaintiffs-appellants below, are Eleanor Heald; Ray Heald; John Arundel; Karen Brown; Richard Brown; Bonnie McMinn; Gregory Stein; Michelle Morlan; William Horwath; Margaret Christina; Robert Christina; Trisha Hopkins; Jim Hopkins; and Domaine Alfred, Inc.

## STATEMENT PURSUANT TO RULE 29.6

Domaine Alfred, Inc., has no parent corporation, and no publicly held company owns 10% or more of its stock.

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## INTRODUCTION

These petitions present a novel constitutional question: whether protectionist, anti-consumer state laws allowing in-state wineries to make direct shipments of wine to consumers, but barring out-of-state ones from doing so, are unconstitutional under the Commerce Clause, despite the regulatory power granted to States by section 2 of the Twenty-first Amendment.

While undeniably interesting, this constitutional question does not mandate the Court's attention at this time. When measured against the traditional standards for granting certiorari, this Court's review is, for now, unwarranted. Contrary to petitioners' assertions, no genuine circuit split exists on whether discriminatory state laws allowing direct shipping by in-state wineries, but barring direct shipping by out-of-state wineries, are unconstitutional. All of the circuits that have passed on the constitutionality of such discriminatory laws have invalidated them, consistent with this Court's recent pronouncements on the relationship between the Commerce Clause and the Twenty-first Amendment. Other circuits either have upheld narrower state laws on the ground that they do not discriminate against out-of-state interests, or have refrained from ruling pending further factual development.

Moreover, this case presents a less than ideal vehicle for consideration of the underlying constitutional question. At a minimum, this Court should await a case that presents *both* the question whether a plainly discriminatory state law is constitutional, *and* the related (and itself substantial) question whether, if such a law is unconstitutional, the appropriate remedy is to allow direct shipping by out-of-state wineries or to ban direct shipping by in-state wineries. And this Court can afford to wait, both because other challenges to direct-shipping laws are currently pending in the federal courts and because States are increasingly repealing such laws and enacting non-discriminatory ones in response to the outcry from consumers and wineries alike. The petitions for certiorari should therefore

be denied. In the alternative, in light of a recent Federal Trade Commission report condemning such discriminatory laws, and in light of the broader federal regulatory interests here, the Court may wish to call for the views of the Solicitor General.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions are reproduced in the petitions at 03-1116 Pet. 1-2 and 44a-71a and 03-1120 Pet. 2 and 45a-69a.

## COUNTERSTATEMENT OF THE CASE

1. In 1933, the Twenty-first Amendment was ratified, ending Prohibition. In its wake, most States adopted a "three-tier" regulatory system for alcohol distribution. *See* 03-1116 Pet. 2. Under that system, producers of alcoholic beverages are typically required to sell their products to licensed wholesalers or distributors, who in turn sell to retailers, who in turn sell to consumers. *See* Staff of the Federal Trade Commission, *Possible Anticompetitive Barriers to E-Commerce: Wine* 5 (July 2003) (hereafter "FTC Report"). In addition, producers of alcoholic beverages who wish to sell their products in interstate commerce are required to obtain a "basic permit" from the federal Alcohol and Tobacco Tax and Trade Bureau (a recent spinoff from the Bureau of Alcohol, Tobacco and Firearms). *See* 27 U.S.C. §§ 203-204.

In the decades since States initially adopted the "three-tier" regulatory system, the American wine industry has grown exponentially. There are now more than 3,000 wineries in all 50 States—over twice as many as there were 30 years ago. *See* WineAmerica, *Wine Facts 2004*, *at* http://www.americanwineries.org/winedata/winefacts04.htm (last visited Apr. 5, 2004); FTC Report 6. Many of these wineries produce relatively small amounts of wine. *See id.* And there has been an accompanying explosion in wine-related tourism—even in States not previously known for their wine industries, such as

Virginia. *See, e.g.*, James T. Yenckel, *Virginia Vintage*, L.A. Times, July 1, 2001, at L13.

While the number of wineries has grown dramatically, the number of wholesalers that distribute wine has correspondingly shrunk, from several thousand in the 1950s to a few hundred today. *See* FTC Report 6. As a result of this consolidation, many wineries, especially smaller ones, have found it increasingly difficult to identify wholesalers willing to carry their products. *See id.* Consumers have likewise complained that they are unable to obtain certain wines from local retailers or to ship wine home when touring out-of-state wineries. *See, e.g.*, *Beskind v. Easley*, 325 F.3d 506, 510-11 (4th Cir. 2003) (discussing typical claims). In addition, with the advent of the Internet, consumers have increasingly sought to order wine online. *See* FTC Report 5.

In response, some 26 States have thus far passed laws allowing in-state and out-of-state wineries to make direct shipments of wine to consumers. *See* Wine Institute, *Direct Shipment Laws by State for Wineries*, *at* http://www.wineinstitute.org/shipwine/analysis/intro_analysis.htm (last modified Mar. 15, 2004). While varying somewhat, these laws typically allow consumers to order restricted amounts of wine from in-state wineries or wineries in States that have reciprocal laws. *See* FTC Report 8. Most of these laws require wineries to obtain licenses before engaging in direct shipping, to remit taxes on their shipments, and to label their packages or obtain an adult signature to prevent wine from being delivered to minors. *See id.* at 8, 26-40.

A number of other States, however, have passed discriminatory laws allowing only in-state wineries, and not out-of-state wineries, to make direct shipments to consumers. In doing so, many state legislatures have candidly admitted their desire to promote the in-state wine industry at the expense of the out-of-state wine industry, by increasing the sale and consumption of wine produced by in-state wineries. *See, e.g.*,

*Dickerson v. Bailey*, 336 F.3d 388, 399 (5th Cir. 2003) (detailing legislative history of Texas Wine Marketing Act). Wineries and consumers have filed lawsuits around the country, challenging the constitutionality of laws in this latter category.

2. The instant lawsuit involves Michigan's laws governing direct shipping. While the operation of the Michigan Liquor Control Code is somewhat complex, the bottom line is not: Michigan allows only in-state wineries, and not out-of-state wineries, to make direct shipments to Michigan consumers. Specifically, Michigan law enables only licensed "wine makers" to make direct shipments. *See* Mich. Comp. Laws § 436.1113(9); *cf.* Mich. Comp. Laws § 436.1111(7) (defining "sale"). The Michigan Liquor Control Commission has construed this statutory provision to allow only in-state wineries, and not out-of-state wineries, to obtain a "wine maker" license. *See* C.A. App. 97-100, 104-05.[1] Out-of-state

---

[1] Michigan contends that out-of-state wineries "may apply to the Liquor Control Commission to direct ship to consumers and bypass the three-tier system by Commission order." 03-1116 Pet. 3. The statutory provision Michigan cites for that proposition, however, is merely a generic statute stating that the sale or importation of alcohol in Michigan is banned unless authorized by the commission. *See* Mich. Comp. Laws § 436.1203(1). Michigan concedes, as it must, that "[t]he policy of the Liquor Control Commission" has been to deny applications by out-of-state wineries to obtain licenses to engage in direct shipping, 03-1116 Pet. 3, and indeed freely recognizes that "[i]n-state wineries are excepted from the three-tier system," *id.* at 4.

Petitioners alternatively contend that "[a]ny qualified out-of-state manufacturer may establish a physical presence in Michigan and be licensed in Michigan as a wine maker." 03-1120 Pet. 5 n.2; *see also* 03-1116 Pet. 23 (same). But petitioners did not make this argument before the Sixth Circuit. *See, e.g.*, C.A. Br. of Intervenor 21 n.8 (discussing "wine maker" provision). Moreover, in order to qualify for a "wine maker" license under the Michigan Liquor Control Commission's construction, an out-of-state winery would actually have to open a *winery* in Michigan, not merely "establish a physical presence" (say, by opening an office). *See* C.A. App. 97-100, 104-05; *cf.* 03-1120 Pet. 10 (contending that "out-of-state wineries may equally *locate* in Michigan and be licensed to sell directly") (emphasis added).

wineries may obtain only an "outstate seller of wine" license, which enables them to make shipments only to licensed wholesalers for distribution through the preexisting "three-tier" system. *See* Mich. Comp. Laws §§ 436.1109(9), 436.1607(1); Mich. Admin. Code rr. 436.1705(2)(d), 436.1719(5).[2]

3. Plaintiffs, various Michigan wine consumers and journalists and an out-of-state winery, brought suit against defendants, various state officials (hereafter "Michigan"), contending that the Michigan regulatory scheme discriminated against interstate commerce in violation of the dormant Commerce Clause. The defendants contended that the Michigan regulatory scheme constituted a valid exercise of the State's power under section 2 of the Twenty-first Amendment. Michigan Beer & Wine Wholesalers Association (hereafter "the wholesalers"), a lobbying organization for the Michigan liquor-distribution industry, intervened in support of the defendants.

In a brief unpublished opinion, the district court granted summary judgment to the defendants, and denied summary judgment to the plaintiffs. *See* 03-1116 Pet. 25a-35a; 03-1120 Pet. 25a-35a. The court observed that the case law concerning direct-shipping laws was "sparse." *See* 03-1116 Pet. 29a; 03-1120 Pet. 29a. Relying heavily on the Seventh Circuit's decision in *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000)—the only extant court of appeals decision on the constitutionality of a direct-shipping law—the court reasoned that section 2 of the Twenty-first Amendment "authorize[d] the

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[2] Michigan claims that petitioners conceded below that "there was nothing in the Michigan law that prohibits out-of-state direct sales and shipments of beverage alcohol." 03-1116 Pet. 19. While petitioners did concede that there is no Michigan statutory provision *specifically* prohibiting direct shipments by out-of-state wineries, *see* C.A. Br. of Appellants 3 n.1, it is undisputed that (1) *any* sale of alcohol in Michigan is banned unless otherwise authorized by the Liquor Control Commission, *see* Mich. Comp. Laws § 436.1203(1), and (2) out-of-state wineries cannot obtain authorization to engage in direct shipping, *see* Mich. Comp. Laws § 436.1113(9); C.A. App. 97-100, 104-05.

states to control alcohol in ways that it [*sic*] cannot control cheese." 03-1116 Pet. 33a; 03-1120 Pet. 33a (internal quotation omitted). The court conceded that a State's power under the Twenty-first Amendment was not "complete." *See* 03-1116 Pet. 34a; 03-1120 Pet. 34a. In order to avail itself of the Twenty-first Amendment, the court continued, a State must act in such a way as to further the "core" concerns of the amendment. *See* 03-1116 Pet. 34a; 03-1120 Pet. 34a. In a single paragraph of analysis, the court stated that Michigan's direct-shipping scheme furthered such a core concern because it was "one provision of a comprehensive system that regulates the flow of alcoholic beverages into and within the State of Michigan." 03-1116 Pet. 34a; 03-1120 Pet. 34a. The court concluded that this overall system was necessary to ensure the collection of taxes and to reduce the risk that minors would obtain alcohol. *See* 03-1116 Pet. 34a-35a; 03-1120 Pet. 34-35a. The court then denied plaintiffs' motion for reconsideration, stating that "[t]he three-tier distribution system is a proper exercise of [Michigan's] constitutional authority" under the Twenty-first Amendment. 03-1116 Pet. 38a-39a; 03-1120 Pet. 39a.

4. The Sixth Circuit (Daughtrey, J., joined by Guy and Boggs, JJ.) reversed. *See* 03-1116 Pet. 1-18a; 03-1120 Pet. 1a-17a. The court began by recognizing that, in a series of decisions immediately after ratification of the Twenty-first Amendment, the Supreme Court had "afforded the states nearly limitless power to regulate alcohol under the new amendment." 03-1116 Pet. 8a; 03-1120 Pet. 8a. The court reasoned, however, that Michigan's reliance on those cases was "disingenuous at best because, as early as the 1960s, the Supreme Court signaled a break with this line of reasoning." 03-1116 Pet. 9a; 03-1120 Pet. 8a. Under this Court's subsequent cases, the court continued, challenges to state alcohol laws should be assessed by "determining how closely related the law in question is to the 'core concerns' of the

Twenty-first Amendment." 03-1116 Pet. 10a; 03-1120 Pet. 9a.

After reviewing this Court's more recent cases, the Sixth Circuit concluded that the mere fact that a State was *motivated* by the "core concerns" of the Twenty-first Amendment could not "shield its laws from constitutional scrutiny." 03-1116 Pet. 11a; 03-1120 Pet. 10a-11a. The court noted that facially discriminatory laws are still subject to strict scrutiny under the dormant Commerce Clause, with the result that the State must prove that no reasonable non-discriminatory alternatives are available to advance the State's legitimate purposes. *See* 03-1116 Pet. 11a; 03-1120 Pet. 11a. The court "reject[ed] the implication that a state's 'virtually complete control' over liquor regulation enables it to discriminate against out-of-state interests in favor of in-state interests." 03-1116 Pet. 12a; 03-1120 Pet. 11a. According to the court, such an approach was "simply forbid[den]" by this Court's decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), which struck down a tax exemption for certain locally produced alcoholic beverages. 03-1116 Pet. 12a; 03-1120 Pet. 11a.

Applying this analytical framework to the Michigan statute, the Sixth Circuit rejected the district court's characterization of the Michigan direct-shipping scheme as a "constitutionally benign product of the state's three-tier system." 03-1116 Pet. 12a; 03-1120 Pet. 11a. As to the dormant Commerce Clause, the court concluded that "it is clear that the Michigan statutory and regulatory scheme treats out-of-state and in-state wineries differently, with the effect of benefitting the in-state wineries and burdening those from out of state." 03-1116 Pet. 14a; 03-1120 Pet. 13a. The court noted that, under the Michigan system, in-state wineries would enjoy both greater access to consumers and greater profits by virtue of their exemption from the three-tier system. *See* 03-1116 Pet. 14a; 03-1120 Pet. 13a.

The Sixth Circuit then considered whether the Michigan direct-shipping scheme furthered any of the "core concerns" of the Twenty-First Amendment and, if so, whether those concerns

could be adequately served by any non-discriminatory alternatives. *See* 03-1116 Pet. 15a; 03-1120 Pet. 14a. The court answered no to both questions. *See* 03-1116 Pet. 15a; 03-1120 Pet. 14a. The court added that "the relevant inquiry is not whether Michigan's three-tier system *as a whole* promotes the goals of temperance, ensuring an orderly market, and raising revenue, but whether the discriminatory scheme challenged in this case * * * does so." 03-1116 Pet. 15a; 03-1120 Pet. 14a (internal quotation omitted).

Finally, the Sixth Circuit rejected the district court's reliance on the Seventh Circuit's decision in *Bridenbaugh*. *See* 03-1116 Pet. 16a-17a; 03-1120 Pet. 15a-17a. The court reasoned that *Bridenbaugh* was "distinguishable on its facts." 03-1116 Pet. 16a; 03-1120 Pet. 16a. It noted that *Bridenbaugh* "did not involve any out-of-state wineries as plaintiffs, and it thus addressed only whether the Indiana statute discriminated against customers who wanted to have out-of-state wine shipped directly to them." 03-1116 Pet. 17a; 03-1120 Pet. 16a. The court added that "it appears the Indiana statutes differ from the provisions at issue here," because those statutes required every drop of liquor, whether from an in-state or out-of-state producer, to pass through the "three-tier" system. 03-1116 Pet. 17a; 03-1120 Pet. 16a. Finally, the court noted that, in *Bridenbaugh*, the out-of-state sellers did not have or want permits, whereas here, the out-of-state sellers wanted permits and were willing to pay taxes on any direct shipments. *See* 03-1116 Pet. 17a; 03-1120 Pet. 16a-17a.

5. Both Michigan and the wholesalers petitioned for rehearing by the panel and rehearing *en banc*. The Sixth Circuit denied both petitions without dissent. *See* 03-1116 Pet. 21a-22a; 03-1120 Pet. 21a-22a.

## REASONS FOR DENYING THE WRIT

### I. THE COURT OF APPEALS CORRECTLY HELD THAT MICHIGAN'S DIRECT-SHIPPING SCHEME IS UNCONSTITUTIONAL.

The Sixth Circuit's holding that the Michigan direct-shipping scheme is discriminatory under the dormant Commerce Clause, and cannot be "saved" from a holding of unconstitutionality by section 2 of the Twenty-first Amendment, is entirely consistent with this Court's precedents—especially the Court's recent precedents addressing the interplay between those two constitutional provisions.

A. This Court has a long history of reviewing state regulations regarding alcoholic beverages. Before the Civil War, the Court held that States had essentially plenary power to regulate the production and trade of alcoholic beverages within their borders. *See License Cases*, 46 U.S. (5 How.) 504, 577 (1847) (Taney, C.J.). In the late nineteenth century, however, the Court, applying its then-prevailing muscular view of the dormant Commerce Clause, began to whittle away at that power. Thus, while the Court continued to allow States to prohibit the production and consumption of alcohol within their borders, *see Mugler v. Kansas*, 123 U.S. 623, 661-63 (1887), the Court also held that States could not restrict the *importation* of liquor to persons possessing a permit, *see Bowman v. Chicago & Northwestern Ry.*, 125 U.S. 465, 499-500 (1888), and then held that States could not regulate the importation or *resale* of alcohol as long as the alcohol remained in its original package, *see Leisy v. Hardin*, 135 U.S. 100, 108-10 (1890).

The practical, and perverse, result of these decisions was that States could regulate alcohol produced by in-state persons, but not alcohol produced by out-of-state persons. In order to eliminate this disparity, Congress enacted the Wilson Act, which authorized States to regulate imported alcohol "to the same extent and in the same manner" as non-imported alcohol.

26 Stat. 313 (1890). This Court, however, construed the Wilson Act to empower States to regulate only the *resale* of imported alcohol, not the direct *shipment* of alcohol to consumers. *See Rhodes v. Iowa*, 170 U.S. 412, 423 (1898); *Vance v. W.A. Vandercook Co.*, 170 U.S. 438, 446 (1898). Again acting to eliminate the disparity in treatment between in-state and out-of-state producers, therefore, Congress passed the Webb-Kenyon Act, which states, in relevant part, that "[t]he shipment or transportation * * * of * * * intoxicating liquor of any kind from one State, Territory, or District of the United States * * * into any State, Territory, or District of the United States * * * to be received, possessed, sold, or in any manner used * * * in violation of any law of such State, Territory, or District * * * is prohibited." 37 Stat. 699 (1913).[3]

B. In 1919, the Eighteenth Amendment was ratified, and the "Noble Experiment" of nationwide Prohibition began. *See, e.g.*, William E. Leuchtenburg, *The Perils of Prosperity 1914-1932*, at 212-17 (2d ed. 1993). In 1933, that experiment came to an end with the ratification of the Twenty-first Amendment. Section 1 of that amendment repealed the Eighteenth Amendment, and thereby ended nationwide Prohibition. For its part, the lesser-known section 2 of that amendment effectively "incorporate[d] [the Webb-Kenyon Act] permanently in the Constitution." 76 Cong. Rec. 4172 (1933) (statement of Sen. Robinson). Section 2, whose language tracks that of the Webb-Kenyon Act almost exactly, was designed to put to rest any lingering doubts about the Webb-Kenyon Act's own constitutionality. *See id.* at 4170 (statement of Sen. Borah). Numerous members of Congress—including Senator Blaine, the amendment's sponsor—stated that the purpose of section 2 was to authorize those States that wished to remain "dry" to do so. *See, e.g., id.* at 4141 (statement of Sen. Blaine); *id.* at 4170 (statement of Sen. Borah); *id.* at 4518 (statement of Rep.

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[3] The Webb-Kenyon Act is reproduced in full at 03-1316 Pet. 44a and 03-1320 Pet. 46a. It is now codified at 27 U.S.C. § 122.

Robinson); *id.* at 4522-23 (statement of Rep. McSwain); *id.* at 4526 (statement of Rep. Tierney). Delegates to the state ratifying conventions made similar comments. *See, e.g.*, *Ratification of the Twenty-first Amendment to the Constitution of the United States* 104, 316 (Everett Somerville Brown ed., 1938) (reprinted 1970). As with the Webb-Kenyon Act itself, nothing in the legislative or ratification history of the Twenty-first Amendment specifically indicates that section 2 was intended to allow States to discriminate *in favor of* in-state producers, at the expense of out-of-state ones.

C. In a series of short opinions in the period following the ratification of the Twenty-first Amendment, this Court did suggest that the power of States to regulate under section 2 was quite generous. *See, e.g.*, *State Bd. of Equalization v. Young's Mkt. Co.*, 299 U.S. 59, 62-64 (1936); *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401, 403-04 (1938); *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 537-38 (1938); *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391, 394 (1939); *Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395, 397-98 (1939); *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138-39 (1939); *Carter v. Virginia*, 321 U.S. 131, 136-38 (1944). But despite some broad statements to the effect that a State's power under section 2 is "unfettered by the Commerce Clause," *e.g.*, *Ziffrin*, 308 U.S. at 138, even those early cases do not unambiguously stand for the proposition that section 2 authorizes *discrimination* against out-of-state producers.

In *Young's Market*—the case on which all of this Court's other early cases rely—this Court considered a constitutional challenge by wholesalers to California's post-Prohibition regulatory scheme, under which wholesalers were required to pay $50 for a wholesaler's license in order to distribute beer, and importers were required to pay an additional $500 in order to import beer into the State. *See* 299 U.S. at 60-61. Somewhat curiously, the Court began by *rejecting* plaintiffs' contention that this scheme was discriminatory and thereby violated the

dormant Commerce Clause. *See id.* at 61-62. The Court reasoned that, while the scheme may have imposed a burden on interstate commerce, "there is no discrimination against [plaintiffs] qua wholesalers," since wholesalers paid the same fee to sell either imported or domestic beer. *Id.* at 61. The Court therefore concluded that "the case does not present a question of discrimination prohibited by the commerce clause." *Id.* at 62. To be sure, the Court went on to reject the argument that, under section 2, "if [a State] permits [the] manufacture and sale [of alcohol], it must let imported liquors compete with the domestic on equal terms." *Id.* But the Court simultaneously rejected the contention that "the amendment has, in respect to liquor, freed the states from all restrictions upon the police power to be found in other provisions of the Constitution." *Id.* at 64. Therefore, insofar as subsequent cases characterized *Young's Market* as affirmatively holding that "discrimination against imported liquor is permissible," *e.g.*, *Mahoney*, 304 U.S. at 403, that characterization is at best questionable.

D. To the extent that some language in the Court's early cases interpreting the Twenty-first Amendment suggested that a State's power under section 2 was effectively unlimited, the Court soon after began distancing itself from such a view. In cases arising in a variety of contexts, the Court made clear that "the Amendment does not license the States to ignore their obligations under other provisions of the Constitution." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984). Thus, the Court held that section 2 did not alter analysis of the constitutionality of state laws under the Due Process Clause, *see Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971); the Equal Protection Clause, *see Craig v. Boren*, 429 U.S. 190, 204-09 (1976); the Export-Import Clause, *see Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 345-46 (1964); the Establishment Clause, *see Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122 n.5 (1982); or the Free Speech Clause, *see 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516

(1996). The Court also held that, despite section 2, certain state laws relating to alcohol could be preempted by conflicting federal law enacted under Congress' affirmative Commerce Clause power. *See, e.g., Capital Cities*, 467 U.S. at 711-16; *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106-14 (1980).

The Court did continue to recognize that section 2 "created an exception to the normal operation of the Commerce Clause." *Craig*, 429 U.S. at 206. The Court expressly stated, however, that section 2 does not give States unfettered power to regulate notwithstanding the dormant Commerce Clause. In *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964), the Court considered the constitutionality of an action by the New York State Liquor Authority to terminate duty-free sales of alcohol to departing international airline travelers. At the outset, the Court noted that, absent the Twenty-first Amendment, the New York authorities would plainly have lacked the power to prohibit such sales, since the alcohol in question merely traveled through the State (under the auspices of the federal Bureau of Customs) for delivery to consumers in foreign countries. *See id.* at 329. The Court conceded that, "in the early years following adoption of the Twenty-first Amendment," it had "made clear * * * that by virtue of its provisions a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders." *Id.* at 330. The Court added, however, that "[t]o draw a conclusion from this line of decisions that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would * * * be an absurd oversimplification." *Id.* at 331-32. The Court further noted that "[i]f the Commerce Clause had been pro tanto 'repealed,' then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor." *Id.* at 332. "Such a

conclusion," the Court continued, "would be patently bizarre and is demonstrably incorrect." *Id.*

The Court concluded that because "the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution," "each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." *Id.* Reasoning that New York's interest in regulating alcohol for ultimate use in a foreign country was comparatively slight, the Court held that the State's action was invalid. *See id.* at 333-34.

E. In its three most recent decisions specifically addressing the interplay between the dormant Commerce Clause and the Twenty-first Amendment, the Court has made clear that the Twenty-first Amendment "has a barely discernible effect in Commerce Clause cases." *City of Newport v. Iacobucci*, 479 U.S. 92, 98 (1986) (Stevens, J., dissenting). Most notably, in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), this Court considered the validity of a Hawaii statute that provided a tax exemption for certain locally produced alcoholic beverages. The Court began by recognizing that it had taken two different approaches in dormant Commerce Clause cases. *See id.* at 270. Where state legislation constituted "economic protectionism"—either because it had a discriminatory purpose or a discriminatory effect—the Court had applied a "stricter rule of invalidity." *Id.* Where, on the other hand, state legislation did not constitute "economic protectionism" but nevertheless burdened interstate commerce, the Court had adopted a "more flexible approach," inquiring into the "balance between local benefits and the burden on interstate commerce." *Id.* (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970)). The Court noted that the Hawaii statute had *both* a discriminatory purpose, since it was undisputed that the purpose of the exemption was to aid Hawaii industry, *and* a discriminatory effect, because the exemption applied only to locally produced beverages. *See id.* at 271. The Court rejected Hawaii's arguments that the tax

exemption was necessary because the local industry was struggling and that the exemption was designed to aid local producers rather than harm out-of-state ones. *See id.* at 272-73.

The Court then considered whether the tax exemption was "saved" by the Twenty-first Amendment. *See id.* at 274-76. The Court, citing *Young's Market* and other early cases, reasoned that "[d]espite broad language in some of the opinions of this Court written shortly after ratification of the Amendment, more recently we have recognized the obscurity of the legislative history of § 2." *Id.* at 274 (footnote omitted).[4] Relying on its decision in *Hostetter*, the Court noted that "[i]t is by now clear that the Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause." *Id.* at 275. The Court reasoned that "[t]he question in this case is thus whether the principles underlying the Twenty-first Amendment are sufficiently implicated by the exemption * * * to outweigh the Commerce Clause principles that would otherwise be offended." *Id.*

Applying that approach, the Court concluded that the Twenty-first Amendment did not affect the analysis of the tax exemption's constitutionality. *See id.* at 276. The Court reasoned that it was "certain" that "[t]he central purpose of the [Twenty-first Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition." *Id.* And the Court added that "[s]tate laws that constitute mere economic protectionism are therefore not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor." *Id.* Because the tax exemption

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[4] Notwithstanding petitioners' claims that "no Supreme Court case to date has directly overruled" *Young's Market* and the Court's other early Twenty-first Amendment decisions, 03-1116 Pet. 10 n.7, and that "these foundation cases [cannot] be written off as historical relics," 03-1120 Pet. 8, the *Bacchus* Court plainly refused to follow the "broad language" in those cases—over Justice Stevens' objection, in dissent, that *Young's Market* compelled the opposite result, *see Bacchus*, 468 U.S. at 282-87.

was not justified by a desire to promote temperance or to carry out any other purpose of the Twenty-first Amendment, the Court rejected Hawaii's reliance on the amendment, and invalidated the statute. *See id.*[5]

In two other cases, the Court applied similar reasoning in refusing to "save" state legislation under the Twenty-first Amendment. *See Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986); *Healy v. Beer Inst., Inc.*, 491 U.S. 324 (1989). In both cases, the Court considered the constitutionality of price-affirmation statutes, which required alcohol producers to affirm that they were selling their products at a price no higher than the lowest price elsewhere in the country. *See Brown-Forman*, 476 U.S. at 576; *Healy*, 491 U.S. at 328. In *Brown-Forman*, the Court held that a "prospective" price-affirmation statute violated the dormant Commerce Clause because it had the impermissible effect of regulating prices in other States. *See* 476 U.S. at 578-84. The Court reasoned that the statute could not be "saved" because the Twenty-first Amendment gave States no authority to control sales in other States. *See id.* at 584-85. In *Healy*, the Court held that a "contemporaneous" price-affirmation statute was invalid under the dormant Commerce Clause, not only because the statute impermissibly regulated prices in other States but also because the statute discriminated against alcohol producers and shippers engaged in interstate commerce. *See* 491 U.S. at 335-41. Following *Brown-Forman*, the Court reasoned that the statute could not be "saved" because the Twenty-first Amendment conferred no authority on States to regulate

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[5] Petitioners suggest that the Court's Twenty-first Amendment analysis in *Bacchus* should somehow be discounted because "the 21st Amendment was never even raised as an issue in that case until it was before this Court," 03-1116 Pet. 12, and because "the State * * * barely attempted to invoke the Amendment in its defense," 03-1120 Pet. 10. The mere fact that an argument was not made below or was not made at length, however, does not magically render this Court's discussion of the argument dictum.

extraterritorially. *See id.* at 341-42. In an opinion concurring in the judgment, Justice Scalia, citing *Bacchus*, concluded that "[the law's] discriminatory character eliminates the immunity afforded by the Twenty-first Amendment." *Id.* at 344.[6]

F. Notwithstanding petitioners' efforts to distinguish this Court's cases on the interplay between the dormant Commerce Clause and the Twenty-first Amendment, *see, e.g.*, 03-1116 Pet. 10-13; 03-1120 Pet. 4, 10, those cases compel the result reached below. Under this Court's dormant Commerce Clause jurisprudence, state statutes that directly regulate or discriminate against interstate commerce, or that have the effect of favoring in-state interests over out-of-state ones, are "virtually *per se* invalid." *Brown-Forman*, 476 U.S. at 579.[7] As the Sixth Circuit correctly concluded, "it is clear that the Michigan statutory and regulatory scheme treats out-of-state and in-state wineries differently, with the effect of benefitting the in-state wineries and burdening those from out of state." 03-1116 Pet. 14a; 03-1120 Pet. 13a. Like Hawaii's taxation scheme in *Bacchus*, *see* 468 U.S. at 271, the Michigan direct-

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[6] In *North Dakota v. United States*, 495 U.S. 423 (1990), the Court considered whether a State's reporting and labeling regulations applicable to alcohol shipped into federal enclaves were valid under the intergovernmental immunity doctrine. The Court held that they were. *See id.* at 434-44 (plurality opinion); *id.* at 444-48 (Scalia, J., concurring in the judgment). In dictum, Justice Stevens, writing for four Justices, stated that the State's "comprehensive system for the distribution of liquor within its borders" was enacted "[i]n the interest of promoting temperance, ensuring orderly market conditions, and raising revenue," and was thus "unquestionably legitimate" under the Twenty-first Amendment. *Id.* at 432 (plurality opinion).

[7] While the wholesalers accuse the Sixth Circuit of employing "the kind of judicial hostility usually associated with restrictions on speech or racial classifications," 03-1120 Pet. 9-10, there can be no doubt that this Court has applied heightened scrutiny to laws that discriminate against out-of-state commerce, just as it has to laws that discriminate against individuals or laws that restrict fundamental rights.

shipping scheme plainly has a discriminatory effect.[8]

As the Sixth Circuit also correctly concluded, petitioners cannot show either that the Michigan direct-shipping scheme "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives," as is necessary to save a discriminatory statute under the dormant Commerce Clause, *e.g.*, *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988), or that it is "designed to promote temperance or to carry out any other purpose of the Twenty-first Amendment," as is necessary to save a discriminatory statute under section 2, *e.g.*, *Bacchus*, 468 U.S. at 276. Although petitioners protest that the prohibition on direct shipping by only out-of-state wineries is necessary to "prevent sales to minors, ensure applicable excise and sales taxes are collected, and that equal exposure to the State's strict alcohol regulatory regiment [*sic*] is achieved," 03-1116 Pet. 23; *see also* 03-1120 Pet. 6 (same), Michigan could readily effectuate all of those purposes by requiring out-of-state wineries, like in-state wineries, to obtain "wine maker" licenses before engaging in direct shipping; requiring them, like in-state wineries, to remit taxes on their shipments; and requiring them, like in-state wineries, to label their packages or obtain an adult signature to

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[8] Michigan suggests that its direct-shipping scheme should instead be measured against the more deferential balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), because "[o]ut-of-state wineries are not similarly situated to in-state wineries for regulation purposes." 03-1116 Pet. 23 (citing *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 216 (2d Cir. 2003)). The only way in which in-state and out-of-state wineries are differently situated here, however, is that in-state wineries may presently obtain a license to engage in direct shipping, whereas out-of-state wineries cannot. Where in-state and out-of-state interests are differently situated only by virtue of the very regulations being challenged, the balancing test of *Pike* is plainly inapplicable. Nor does the fact that there may be many *more* out-of-state wineries than in-state ones, *see* 03-1116 Pet. 4, 23, 24, alter the analysis, *see, e.g.*, *Bacchus*, 468 U.S. at 268-69 (holding that Hawaii statute was discriminatory despite fact that exempted locally produced alcoholic beverages constituted less than 1% of total alcohol sold in the State).

prevent wine from being delivered to minors.[9] Indeed, the FTC reached precisely this conclusion. As the FTC's recent nationwide study demonstrated, those States that have imposed similar requirements have reported "few or no problems with shipments to minors or with tax collection." FTC Report 4.[10] Unsurprisingly, therefore, the Sixth Circuit concluded, "based on the evidence in the record, that defendants have not shown that the Michigan scheme's discrimination between in-state and out-of-state wineries furthers any of the [State's] concerns * * *, much less that no reasonable non-discriminatory means exists to satisfy those concerns." 03-1116 Pet. 15a; 03-1120 Pet. 14a. This conclusion was evidently correct, and the Sixth Circuit's decision to invalidate Michigan's direct-shipping scheme was entirely consistent with this Court's precedents.[11]

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[9] The Michigan Liquor Control Commission could impose all of these requirements through the simple expedient of allowing out-of-state wineries to obtain "wine maker" licenses, which would automatically subject them to the detailed requirements currently applicable to direct shipments by in-state wineries. *See* Mich. Comp. Laws § 436.1203.

[10] Citing an Alabama district-court decision, Michigan suggests that Michigan courts may lack personal jurisdiction over *unlicensed* out-of-state producers. *See* 03-1116 Pet. 13-14 & n.12, 16, 24. It seems doubtful at best, however, that Michigan courts would lack personal jurisdiction over an out-of-state producer that had purposely availed itself of the benefits of Michigan law by applying for a direct-shipping license. Contrary to the wholesalers' suggestion, *see* 03-1120 Pet. 11, once personal jurisdiction is established over out-of-state producers, Michigan could prosecute them for any violations of state law—either in state court or, under the Twenty-first Amendment Enforcement Act, in federal court, *see* 27 U.S.C. § 122a.

[11] To the extent that petitioners insinuate that the Webb-Kenyon Act somehow carries independent weight in the analysis, *see, e.g.*, 03-1116 Pet. 17; 03-1120 Pet. 2, 4, 9 & n.5, 11; *cf.* Ohio Br. 18-19 (same), that suggestion lacks merit. The only court of appeals expressly to have addressed this issue has held that, because section 2 of the Twenty-first Amendment, like the Webb-Kenyon Act, could constitute a reconveyance of authority to the States, and because the language of the Webb-Kenyon Act and section 2 is materially identical, the two provisions must be identically construed. *See Bainbridge v. Turner*, 311 F.3d 1104, 1110-11 (11th Cir. 2002).

## II. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS.

The Sixth Circuit invalidated the Michigan direct-shipping scheme because it discriminated against interstate commerce. That holding is consistent not only with the prior decisions of this Court, but also with the decisions of other courts of appeals, all of which have invalidated similar state statutes and upheld only narrower ones.

A. As Michigan concedes, *see* 03-1116 Pet. 7, the Sixth Circuit's holding on the constitutionality of Michigan's direct-shipping scheme is unquestionably consistent with the recent holdings of the Fourth and Fifth Circuits concerning similar state laws.

1. In *Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003), the Fourth Circuit struck down North Carolina's direct-shipping laws, which unambiguously allowed in-state wineries but not out-of-state wineries to engage in direct shipping, *see id.* at 510. Writing for the court, Judge Niemeyer, joined by Judges Luttig and Traxler, began by tracing the history of the Twenty-first Amendment, noting that the Twenty-first Amendment withdrew some, but not all, of the power of Congress to regulate interstate commerce. *See id.* at 512-13. Citing this Court's decision in *Bacchus*, the court first considered whether the North Carolina statute would "violate[] the Commerce Clause without consideration of the Twenty-first Amendment." *Id.* at 513-14. The court concluded that there was "little doubt that those laws treat in-state manufacturers of wine differently from out-of-state manufacturers of wine, with the undoubted effect of benefiting the in-state manufacturers and burdening the out-of-state manufacturers." *Id.* at 515. The court added that North Carolina had various reasonable non-discriminatory alternatives, including requiring out-of-state wineries to establish an in-state presence and import their wine to that location. *See id.* at 515-16. Turning to the Twenty-first

Amendment, the court reasoned that North Carolina could not identify any Twenty-first Amendment interest that was served by its system of "selective deregulation." *Id.* at 517. The court therefore concluded that North Carolina's law "cannot credibly be portrayed as anything other than local economic boosterism in the guise of a law aimed at alcoholic beverage control." *Id.*

2. So too, in *Dickerson v. Bailey*, 336 F.3d 388 (5th Cir. 2003), the Fifth Circuit invalidated Texas' direct-shipping laws, which likewise unambiguously allowed in-state wineries but not out-of-state wineries to engage in direct shipping, *see id.* at 393. Like the Sixth Circuit in this case and the Fourth Circuit in *Beskind*, the Fifth Circuit began by analyzing the statute under the dormant Commerce Clause. *See id.* at 395-403. The court found that "[i]t is clear beyond peradventure" that the Texas statute had the effect of discriminating against out-of-state wineries, *id.* at 398, and added that there was substantial evidence that the direct-shipping exemption for in-state wineries was enacted with a discriminatory purpose, *see id.* at 399-400. The court reasoned that "the operable facts of this case are identical to those resulting in the Supreme Court's decision in *Bacchus*." *Id.* at 400. The court concluded that Texas had failed to demonstrate that alternative means were unavailable to achieve its policy goals. *See id.* at 401-02. As to the Twenty-first Amendment, the court stated that the appropriate inquiry, under *Bacchus*, was whether the statute furthered a "core concern" of the Twenty-first Amendment. *Id.* at 404. The court rejected Texas' argument that the Twenty-first Amendment required the Texas laws to be reviewed deferentially, reasoning that such a test was a "legal dinosaur that went extinct long ago in the history of the Supreme Court's Twenty-first Amendment jurisprudence." *Id.* at 406. Instead, citing this Court's decisions in *Bacchus*, *Brown-Forman*, and other cases, the court concluded that it was required to "scrutinize strictly whether a state's statutes are tailored to the Twenty-First Amendment's 'core concerns.'" *Id.* The court

concluded that Texas' laws were not. *Id.* at 406-07.

B. Petitioners contend that the first two circuits to have addressed the issue, the Seventh and Eleventh Circuits, reached conflicting results on the constitutionality of state direct-shipping laws. *See* 03-1116 Pet. 6-10; 03-1120 Pet. 12-15. Not so. Those decisions, and a more recent decision of the Second Circuit, can readily be reconciled with the Sixth Circuit's decision.

1. In *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000), the Seventh Circuit upheld Indiana's direct-shipping laws only after finding that they were not discriminatory, and its decision is therefore consistent with the decision below. Admittedly, the *Bridenbaugh* court began its analysis with the Twenty-first Amendment, rather than the dormant Commerce Clause. *Id.* at 851-53.[12] Like the Fourth, Fifth, and Sixth Circuits after it, however, the Seventh Circuit held that the Twenty-first Amendment could not be used to save a state law that discriminated against out-of-state sellers. Writing for the court, Judge Easterbrook reasoned that, under this Court's recent Twenty-first Amendment decisions, "the greater power to forbid imports does not imply a lesser power to allow imports on discriminatory terms." *Id.* at 853. The court noted that, in those decisions, this Court had "appl[ied] an

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[12] The wholesalers contend that "[t]he Sixth Circuit explicitly disagreed with *Bridenbaugh*'s approach and its result." 03-1120 Pet. 12; *see generally* Ohio Br. 6-9 (suggesting that circuits are split because they have "applied a different legal test," with some starting their analysis with the dormant Commerce Clause and others with the Twenty-first Amendment). To be sure, the Sixth Circuit did chastise the Seventh Circuit for not fully addressing the dormant Commerce Clause issue, *see* 03-1116 Pet. 16a-17a; 03-1120 Pet. 15a-16a. This Court does not ordinarily grant certiorari, however, to resolve disagreements about the order in which constitutional arguments should be addressed—even if those disagreements are dressed up as disagreements about "the analytical framework to be employed." 03-1274 Br. for Private Respondents 9; *see also* 03-1274 Br. for State Respondents 4, 6, 8, 10 (same).

unconstitutional-conditions approach to the use of the § 2 power," "treat[ing] § 2 as eliminating economic discrimination against *in-state* commerce * * * without authorizing discrimination against *out-of-state* sellers." *Id.* (emphasis added). The court therefore concluded that "§ 2 enables a state to do to importation of liquor * * * what it chooses to do to internal sales of liquor, but nothing more." *Id.*

Although the Seventh Circuit did proceed to uphold Indiana's direct-shipping laws, it did so based on its reading of those laws, which it construed to require that "*every* drop of liquor pass through its three-tiered system and be subjected to taxation." *Id.* The court reasoned that Indiana law barred in-state and out-of-state sellers *alike* from engaging in direct shipping, as long as they also sold alcohol in other States, and added that such sellers could still engage in direct shipping simply by obtaining wholesaler permits. *Id.* at 853-54.[13] On that basis, the court concluded that there was no "functional discrimination" between out-of-state and in-state sellers. *Id.* at 853. Notably, both the Sixth Circuit in this case, *see* 03-1116 Pet. 16a-17a; 03-1120 Pet. 15a-17a, and the Fifth Circuit in *Dickerson*, *see* 336 F.3d at 400-01, distinguished *Bridenbaugh* factually, on the ground that it involved a different statutory scheme. Because *Bridenbaugh* adopted the conventional view of the Twenty-first Amendment, and because the statutory scheme at issue was found to be not discriminatory, *Bridenbaugh* does not conflict with the consistent line of later

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[13] The wholesalers contend that the "*Bridenbaugh* opinion makes clear that Indiana, like Michigan, permitted 'local wineries but not [out-of-state] wineries * * * to ship directly to consumers.'" 03-1120 Pet. 12, 13 n.6 (quoting 227 F.3d at 851); *see also* 03-1274 Br. for Private Respondents 12 (same); *cf.* 03-1116 Pet. 8 (contending that "Michigan, in application of its shipping law, is the same as Indiana"). But that is not what *Bridenbaugh*, or the Indiana statute, says. *Bridenbaugh* actually says that Indiana permitted "local wineries, but not wineries *'in the business of selling * * * in another state or country,'* to ship directly" to Indiana consumers. *Id.* (quoting Ind. Code § 7.1-5-11-1.5(a)) (emphasis added).

decisions invalidating more plainly discriminatory direct-shipping laws.

2. In *Bainbridge v. Turner*, 311 F.3d 1104 (11th Cir. 2002), the Eleventh Circuit declined to reach a final decision on a challenge to Florida's direct-shipping laws, and its decision is thus consistent with the decision below. Florida's laws allowed in-state wineries but not out-of-state wineries to engage in direct shipping using their own vehicles (and, at least in practice, by common carrier). *See id.* at 1107 & n.5. Like the Fourth, Fifth, and Sixth Circuits, the Eleventh Circuit began by concluding that the statutory scheme discriminated against interstate commerce. *See id.* at 1108-11. The court reasoned that Florida's regulatory scheme discriminated on its face, and that Florida could adopt various non-discriminatory alternatives (including a requirement that out-of-state wineries obtain licenses). *See id.* at 1109-10.

The Eleventh Circuit then turned to the Twenty-first Amendment. *See id.* at 1111-15. Citing this Court's decision in *Healy*, the court reasoned that "the Amendment falls short of giving states free rein in regulating the importation of alcoholic beverages." *Id.* at 1112. The court concluded that, where a state law amounted to "mere economic protectionism" under *Bacchus*, the Twenty-first Amendment had no independent effect. *See id.* at 1112-13. To be sure, the court drew a distinction (in our view illusory, *see Bacchus*, 468 U.S. at 271) between laws that "amount to mere economic protectionism," on the one hand, and laws that "discriminate on their face," on the other, and suggested that the Twenty-first Amendment could affect the analysis in the latter instance if a State could show that the regulation is "genuinely need[ed]" to effectuate a "core concern" of the Twenty-first Amendment. *Bainbridge*, 311 F.3d at 1112-13 (internal quotation omitted). However, the court then remanded for factfinding on whether Florida's facially discriminatory law was needed to effectuate a core concern—though it rejected outright Florida's argument that the

law was necessary to protect minors, and expressed skepticism about the argument that the law was necessary to collect taxes. *See id.* at 1114-15. The Eleventh Circuit's decision in *Bainbridge* was therefore effectively interlocutory. Because the district court may ultimately conclude, like the Fourth, Fifth, and Sixth Circuits, that the State's justifications for its discriminatory regulatory scheme are insufficient, the Eleventh Circuit does not presently stand in conflict with those circuits.[14]

3. Finally, in *Swedenburg v. Kelly*, 358 F.3d 223 (2d Cir. 2004), the Second Circuit upheld New York's regulatory scheme only after determining that it was not discriminatory, and that decision thus does not conflict with the decision below. Critically, New York's regulatory scheme allowed out-of-state wineries to obtain direct-shipping licenses, provided that they paid a license fee and established a physical presence in the State by "maintain[ing] a branch factory, office, or storeroom within the state." N.Y. Alco. Bev. Cont. Law §§ 3(37), 76(4), 77(2). The Second Circuit expressly distinguished the New York statutory scheme from the ones before the Fourth, Fifth, and Eleventh Circuits, and before the Sixth Circuit *in this case*. *See Swedenburg*, 358 F.3d at 229 n.3.[15]

Like the Seventh Circuit, the Second Circuit began its constitutional analysis not with the dormant Commerce Clause, but rather with the Twenty-first Amendment. *See id.* at 230.

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[14] Admittedly, as the petitioners note, *see* 03-1116 Pet. 9; 03-1120 Pet. 13, the Eleventh Circuit did suggest, in a short footnote, that the district court should apply something less than strict scrutiny to the State's justifications on remand, *see Bainbridge*, 311 F.3d at 1114 n.17. To the extent that this standard of review is more deferential than the standard adopted by other circuits, however, that difference does not justify this Court's review—especially since the district court may yet reach the same result as those other circuits even under that apparently more deferential standard.

[15] The Second Circuit's opinion, like the Seventh Circuit's in *Bridenbaugh*, therefore belies the (unelaborated) claim of *amici* that the regulatory scheme at issue was "virtually identical" to Michigan's. Ohio Br. 4; NABCA Br. 7.

Although the court expressed its disagreement with those circuits that chose to begin with the dormant Commerce Clause, it stated that it "need not assess the other circuits' determinations, as the statutes challenged in those cases were *significantly different* from the regulatory regime at issue here." *Id.* at 231 n.7 (emphasis added). The court noted, moreover, that the Fourth Circuit had suggested that a "presence" requirement, like that imposed by New York law, could constitute a possible non-discriminatory alternative to an outright ban on direct shipping by out-of-state wineries. *See id.*

The court then considered the Twenty-first Amendment, tracing its history and this Court's decisions construing it. *See id.* at 230-37. Although the court seemed to give section 2 of the Twenty-first Amendment a robust construction, *see id.* at 236-37, the court ultimately conceded that protectionist laws were not entitled to the same degree of deference under section 2, *see id.* Crucially, the court found that there was "no indication, based on the facts presented here, that the regulatory scheme is intended to favor local interests over out-of-state interests," on the ground that "[a]ll wineries, whether in-state or out-of-state, are permitted to obtain a license as long as the winery establishes a physical presence in the state." *Id.* at 237. The court therefore concluded that the New York regulatory scheme allowed direct shipping "in a non-discriminatory manner." *Id.* at 239. Because New York's statutory scheme, like Indiana's, was found to be non-discriminatory, the Second Circuit's decision, like the Seventh Circuit's in *Bridenbaugh*, does not conflict with the decision below.

## III. THIS CASE IS A LESS THAN IDEAL VEHICLE FOR CONSIDERATION OF THE UNDERLYING CONSTITUTIONAL QUESTION.

Even if this Court were to conclude that the Sixth Circuit's decision was inconsistent with decisions of this Court or other circuits, this case presents a less than ideal vehicle for consideration of the underlying constitutional question.

1. The primary problem with this case is that it does not present the logically subsequent question whether, if a state direct-shipping law is held to be unconstitutional, the appropriate *remedy* for the constitutional violation is to allow direct shipping by out-of-state wineries or to ban direct shipping by in-state wineries. The district court did not have occasion to reach the remedy question because it upheld the Michigan direct-shipping scheme. Before the Sixth Circuit, none of the parties briefed the question of the appropriate remedy, and the court of appeals opted merely to reverse the district court's decision on the merits and remand for entry of judgment in favor of the plaintiffs. *See* 03-1116 Pet. 18a, 20a; 03-1120 Pet. 17a, 20a. Thus, far from "effectively granting the plaintiffs the relief requested," *id.* at 5, or somehow advantaging out-of-state wineries over in-state wineries, *id.* at 6, the court of appeals was entirely silent on the issue of the appropriate remedy, leaving the issue to the district court on remand and thereby postponing its own consideration of the issue.

While the courts of appeals have addressed the *constitutionality* of state direct-shipping laws in a consistent manner, they have reached conflicting results on the appropriate *remedy* for a constitutional violation. *Compare Dickerson*, 336 F.3d at 407-09 (allowing direct shipping by out-of-state wineries), *with Beskind*, 325 F.3d at 517-20 (prohibiting direct shipping by in-state wineries). Although those decisions turn to some extent on the structure of the state regulatory scheme, *see, e.g.*, *id.* at 519, they also present a broader question whether extending benefits to disadvantaged parties or imposing burdens on advantaged parties is the more appropriate remedy for dormant Commerce Clause violations more generally, *see, e.g.*, *Dickerson*, 336 F.3d at 407-08. And by claiming (albeit erroneously) that the Sixth Circuit's decision conflicts with the Fourth Circuit's decision in *Beskind* on the issue of the appropriate remedy, petitioners themselves implicitly concede that the remedy issue is independently worthy of this Court's

consideration. *See, e.g.*, 03-1116 Pet. 13-14; 03-1120 Pet. 13-14. This Court should therefore wait for a case that presents not only the constitutional question, but also the remedial one.[16]

2. Since the petitions in this case were filed, plaintiffs in the New York direct-shipping litigation have also filed a petition for certiorari from the Second Circuit's decision. *See Swedenburg v. Kelly*, No. 03-1274 (petition filed Mar. 8, 2004). That petition should be denied for the same reasons as the petitions in this case, and for some additional ones. As the Second Circuit itself recognized, *Swedenburg* involves an unusual statutory scheme, in which out-of-state wineries *can* engage in direct shipping provided they establish a "physical presence" within the State. *See, e.g.*, 358 F.3d at 229 n.3, 231 n.7.[17] And by virtue of its holding that the New York regulatory

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[16] In a quixotic detour, Michigan suggests that this case would be a particularly *good* vehicle for this Court's consideration because it involves a facial challenge. *See* 03-1116 Pet. 18-21. The Sixth Circuit, however, held only that the Michigan *regulatory* scheme, as construed and applied by the Michigan Liquor Control Commission, was facially, or plainly, *discriminatory*—not that plaintiffs were bringing only a facial (as opposed to an as-applied) challenge to the Michigan *statutory* scheme. *See, e.g.*, 03-1116 Pet. 15a; 03-1120 Pet. 14a. It is clear from the complaint that the plaintiffs were bringing both. *See, e.g.*, C.A. App. 21.

[17] The petitioners in *Swedenburg* suggest that New York law does *not* allow out-of-state wineries to engage in direct shipping if they establish a mere "physical presence" in the State, but allows them to do so only if they actually open a *winery* in the State. *See, e.g.*, 03-1274 Pet. 2-3, 15-16. To the extent that there is any ambiguity on the threshold factual question of what New York law actually requires (and thus on the legal question of whether New York law is discriminatory), such ambiguity counsels against, not in favor of, the granting of certiorari—as the plaintiffs in *Swedenburg* themselves contended in *opposing* certiorari from the Seventh Circuit's decision in *Bridenbaugh*. *See* 00-1323 Br. of *Amici* David Lucas and Juanita Swedenburg 5-6. In any event, the better reading of New York law is that it does allow direct shipping upon the establishment of a "physical presence" in the State. *See* N.Y. Alco. Bev. Cont. Law §§ 3(37), 76(4), 77(2). Notably, the respondents in *Swedenburg* have acknowledged that New York's regulatory scheme is "meaningfully different" from Michigan's, 03-

scheme was constitutional, the Second Circuit, like the Sixth Circuit, did not reach the remedial issue at all.[18]

Moreover, *Swedenburg* may shortly be rendered moot by pending legislation that would allow direct shipping by out-of-state wineries in States that have reciprocal laws.[19] While the governor of New York previously vetoed a similar bill after it was passed by the New York legislature, *see Swedenburg*, 358 F.3d at 239, the governor recently reversed course and included the proposed legislation in his most recent state budget proposal, *see, e.g.*, Marc Humbert, *Wineries Cheer Proposal for Direct Shipping*, Albany Times Union, Jan. 23, 2004, at B3. Notably, the staff of the Federal Trade Commission has expressed its support for the proposed legislation in a letter to leading members of the New York legislature. *See* Letter from Todd J. Zywicki *et al.* to William Magee *et al.* (Mar. 29, 2004), *available at* http://www.ftc.gov/opa/2004/03/nywine.htm. Because of this pending legislation, and because of the peculiar nature of the regulatory scheme being challenged, the petition in *Swedenburg* should be denied in any event.[20]

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1274 Br. for State Respondents 8; *see also* 03-1274 Br. for Private Respondents 7-8 (same), and have added that "[t]hat factor may be significant in this Court's analysis," *id.* at 8 n.3, and indeed "perhaps dispositive," 03-1274 Br. for State Respondents 7.

[18] Should the Court choose to grant certiorari despite the absence of the remedial issue in either of these cases, the Sixth Circuit case presents a considerably better vehicle because it involves the more common regulatory scheme in which out-of-state wineries are prohibited outright from engaging in direct shipping. *See* Ohio Br. 10 (stating that "Michigan's law provides a perfect example of typical State efforts to regulate alcohol shipments"). In that event, the Court should grant certiorari on the two instant petitions, and hold the petition in *Swedenburg*.

[19] Astonishingly, the state respondents in *Swedenburg* suggest that the possibility that the case will be mooted should have no bearing on this Court's decision as to whether to add the case to its calendar. *See* 03-1274 Br. for State Respondents 20 n.6.

[20] The petitioners in *Swedenburg* contend that their case would be a

3. To the extent that this Court were to conclude that these cases present potentially certworthy issues, the Court can afford to wait for a better vehicle for their consideration. As petitioners concede, *see, e.g.*, 03-1120 Pet. 15 n.8, numerous other challenges to direct-shipping laws are currently pending in the federal courts—including the challenge to Florida's direct-shipping laws, which is still pending before the district court on remand, *see Bainbridge v. Turner*, No. 99-CV-2681 (M.D. Fla.). Our understanding is that litigation is being actively considered in other jurisdictions as well. And many States are not waiting for their laws to be invalidated, but are instead amending them in response to the outcry from consumers and wineries alike. Should a genuine circuit split arise on the constitutionality of state direct-shipping laws, this Court can act then. There is no need for it to weigh in now—or to weigh in here. These cases are more like a 2000 Bordeaux than a 1961. All of the pending petitions for certiorari should be denied.

## CONCLUSION

For the foregoing reasons, this Court should deny the petitions for certiorari. In the alternative, in light of the FTC's position on the direct shipment of wine, and the regulatory interests of the Alcohol and Tobacco Tax and Trade Bureau and other federal agencies, the Court may wish to call for the views of the Solicitor General.

Respectfully submitted,

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particularly good vehicle because plaintiffs challenged the New York regulatory scheme under both the dormant Commerce Clause and the Privileges and Immunities Clause of Article IV. *See* 03-1274 Pet. 24-27. Petitioners do not contend, however, that there is a circuit split on the question whether state direct-shipping laws violate the Privileges and Immunities Clause, and the Second Circuit (operating on the premise that New York law allowed direct shipping by out-of-state wineries provided they established a "physical presence" within the State) summarily rejected petitioners' argument. *See Swedenburg*, 358 F.3d at 239.

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No. 03-1120

IN THE

# Supreme Court of the United States

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,
*Petitioner,*

*v.*

ELEANOR HEALD, *et al.*
*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

## REPLY BRIEF FOR THE PETITIONER

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

## REPLY BRIEF FOR THE PETITIONER

The questions presented in MB&WWA's petition are plainly ripe for this Court's review, and this case is an excellent vehicle. Six different federal Circuits have now considered the constitutionality of broadly similar state statutes barring shipment of wine across the state's borders directly to resident retail customers.[1] (The most recent decision, rendered since MB&WWA's petition was filed, is *Swedenburg* v. *Kelly*, 358 F.3d 223 (2d Cir. Feb. 12, 2004), upholding the New York statute.) The Circuits have disagreed sharply

[1] *Bridenbaugh* v. *Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000) (Indiana) (upheld statute); *Bainbridge* v. *Turner*, 311 F.3d 1104, 1115 n.17 (11th Cir. 2002) (Florida) (remanded for application of "far less than ... strict scrutiny"); *Beskind* v. *Easley*, 325 F.3d 506 (4th Cir. 2003) (North Carolina) (invalidated only in-state exception); *Dickerson* v. *Bailey*, 336 F.3d 388 (5th Cir. 2003) (Texas) (invalidated statute); *Heald* v. *Engler*, 342 F.3d 517 (6th Cir. 2003) (Michigan) (invalidated statute); *Swedenburg* v. *Kelly*, 358 F.3d 223 (2d Cir. 2004) (New York) (upheld statute).

and explicitly about (a) whether the Twenty-first Amendment allows states to bar such shipments while they permit licensed in-state wineries to ship directly to retail customers, and (b) if not, whether the proper remedy is to strike the exception for in-state wineries or invalidate the entire statutory scheme, leaving the importation of intoxicating beverages for use within the state entirely uncontrolled. This case presents both of these questions, in the context of a typical state statute. The Court should grant both the present petition (No. 03-1120) and the petition of the State of Michigan (No. 03-1116).

1. As the petition noted, the Sixth Circuit authorized respondents to do exactly what the Twenty-first Amendment expressly prohibits: "import[] [intoxicating liquors] into [Michigan] for delivery or use therein . . . in violation of the laws thereof." U.S. Const. amend. XXI, § 2. No decision of this Court—indeed, no individual Justice—has ever suggested that the dormant Commerce Clause somehow overrides or limits the explicit Twenty-first Amendment power to regulate the physical importation of alcohol for use within a state's borders. *See* Pet. 10-11; *see also Swedenburg*, 358 F.3d at 233, 236-237. On the contrary, as respondents acknowledge (Opp. 9-10), the purpose of section 2 of the Amendment was to override the dormant Commerce Clause.

2. This Court's cases have consistently acknowledged broad state power over physical importation, unconstrained by the dormant Commerce Clause. As respondents grudgingly admit, "[T]he Court [in *Young's Market*] . . . reject[ed] the argument that, under section 2, 'if [a State] permits [the] manufacture and sale [of alcohol], it must let imported liquors compete with the domestic on equal terms.'" Opp. 12 (citation omitted) (last three alterations in original). All of this Court's decisions bearing on physical importation are consistent. *See* Pet. 7-9. All of the cases cited by respondents (Opp. 12-17) involved very different issues: inapplicability of the Twenty-first Amendment by its own terms, or state legislation regulating prices in other states, or Congress's right to exercise its own Commerce Clause power, or

state violations of constitutional provisions other than the Commerce Clause in contexts other than physical importation. *See* Pet. 9-11; *Swedenburg*, 358 F.3d at 234-237.

In particular, *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964), involved New York's attempt to regulate alcohol intended to be delivered and used "not in New York, but in a foreign country," *id.* at 333, and the issue was whether New York must abide by "a law passed by Congress in the exercise of its explicit power under the Constitution to regulate commerce with foreign nations," *id.* at 334. It was in that context—the coexistence of federal and state regulatory power, not competing constitutional demands on the states—that the Court said "both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution." *Id.* at 332.[2] And as respondents recognize, *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U.S. 573 (1986), and *Healy* v. *Beer Institute, Inc.*, 491 U.S. 324 (1989), dealt with state statutes that "had the impermissible effect of regulating [alcohol] prices in *other* States." Opp. 16 (emphasis added); *see also id.* at 16-17 (*Healy* rested on principle that "the Twenty-first Amendment conferred no authority on States to regulate extraterritorially."). Finally, *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984), did not involve importation but rather a discriminatory tax imposed after beverages had crossed

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[2] There is no competing congressional enactment in this case. On the contrary, after the adoption of the Twenty-first Amendment, Congress exercised its Commerce Clause power in 1935 to readopt the Webb-Kenyon Act, 27 U.S.C. § 122 (1935), which is similar to section 2 of the Amendment. In light of Webb-Kenyon, the dormant Commerce Clause has no proper application here, because Congress has dealt explicitly with the precise question at issue. *See Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 154 (1982) ("Once Congress acts, courts are not free to review state taxes or other regulations under the dormant Commerce Clause. When Congress has struck the balance it deems appropriate, the courts are no longer needed to prevent States from burdening commerce, and it matters not that the courts would invalidate the state tax or regulation under the Commerce Clause in the absence of congressional action.").

state lines.[3] As the *Swedenburg* court noted, the state sought to defend the tax as not affecting commerce (and raised the Twenty-first Amendment only in this Court), and the Court struck it down (5-3) because "the purpose of the tax was to stimulate a local industry, not to regulate the use and distribution of alcohol." *Swedenburg*, 358 F.3d at 236 n.10.

3. Respondents' contention that the six Circuit decisions can "readily be reconciled" (Opp. 22), ignores what the courts did and said. In particular, the Sixth Circuit, below, struck down a Michigan statute that is indistinguishable from the Indiana statute upheld by the Seventh Circuit in *Bridenbaugh*. The Sixth Circuit asserted (erroneously, as we show immediately below) that the cases were factually distinguishable, but it also rejected Judge Easterbrook's *Bridenbaugh* opinion for "failure to engage in the requisite dormant Commerce Clause analysis" and it cited the Eleventh Circuit's disagreement in *Bainbridge* with "the analytical framework used in *Bridenbaugh*." Pet. App. 16a. But it is not just the Sixth and Seventh Circuits that conflict on the merits. In *Swedenburg*, the Second Circuit roundly condemned the "flawed" approach taken by all four of the Circuits that have struck down state statutes, before declining to address the specifics of those other decisions. *See* 358 F.3d at 231.

a. The decision below conflicts with *Bridenbaugh* because, contrary to the assertions of both the court below (Pet. App. 16a) and respondents (Opp. 1, 22-24), Indiana's rules are indistinguishable from Michigan's. Both states allow licensed in-state wineries, but not out-of-state wineries, to ship directly to consumers. The Seventh Circuit said, correctly, "Indiana permits *local [Indiana]* wineries, but not

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[3] "Nothing in *Bacchus* . . . overrules the principles iterated in [earlier Supreme Court cases]," including the "authority of the state under the [Twenty-first] Amendment over *importation* of intoxicants." *Milton S. Kronheim & Co.* v. *District of Columbia*, 91 F.3d 193, 203 (D.C. Cir. 1996) (emphasis added).

wineries '*in the business of selling* [alcohol] . . . in another state or country', to ship directly to Indiana consumers." *Bridenbaugh*, 227 F.3d at 851 (emphases added) (ellipsis in original). Respondents strain (Opp. 23) to read this as saying that in-state wineries that also sell out of state are similarly restricted, but that is not what the statute says.[4] And respondents' Counsel of Record, who was also lead counsel for the plaintiffs in *Bridenbaugh*, told both the Seventh Circuit *and this Court in Bridenbaugh* that Indiana draws the same in-state/out-of-state distinction as Michigan and other states do. *See* Br. of Pls.-Appellees 5, *Bridenbaugh* v. *Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000) (Nos. 00-1044, 00-1046) ("Indiana law prohibits any person in the business of selling alcoholic beverages in another state from shipping wine directly to an Indiana resident. The prohibition applies only to out-of-state businesses. Indiana wholesalers, retailers and small wineries are allowed to make such direct shipments to consumers' homes."); No. 00-1323 Pet. 2 n.1 ("Indiana Code §§ 7.1-5-11-1.5(a) and 7.1-5-1-9.5(b) . . . make direct shipments of wine from an out-of-state seller a felony. By contrast, in-state wine sellers have statutory authority to ship wine directly to private residences.").[5]

b. The decision below also conflicts with *Swedenburg*, which upheld New York's three-tier law because the Second Circuit fundamentally disagreed with the "dormant Commerce Clause first" approach of the Sixth Circuit. *See Swe-*

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[4] Ind. Code § 7.1-5-11-1.5 ("It is unlawful for a person in the business of selling alcoholic beverages in another state or country to ship or cause to be shipped an alcoholic beverage directly to an Indiana resident who does not hold a valid wholesaler permit under this title.").

[5] Respondents cite the Seventh Circuit's statement that Indiana requires "*every* drop of liquor [to] pass through its three-tiered system and be subjected to taxation" (Opp. 23), but neither Indiana nor Michigan requires wine sold by in-state wineries to pass through *all three tiers*, a fact that the Seventh Circuit explicitly understood as to Indiana. Both states require all alcoholic beverages to pass through a state licensee with a substantial in-state presence, who is responsible for compliance with the state's revenue, beverage consumption, and other important laws.

*denburg*, 358 F.3d at 231. The Twenty-first Amendment, the court said, "should not ... be subordinated to the dormant Commerce Clause." *Id.* at 233. Instead, the court asked whether the challenged state statute falls within the Twenty-first Amendment's express grant of authority to regulate the "transportation or importation" of alcohol into the State "for delivery or use therein." U.S. Const. amend. XXI, § 2. Because New York's law "falls squarely within the ambit" of that authority, the Second Circuit upheld it. *Swedenburg*, 358 F.3d at 237. *Swedenburg* did not turn on the uniqueness of the New York statutory scheme, but rather on the inherent power of the states under the Twenty-first Amendment and the Court's conclusion that "[a]llowing dormant Commerce Clause concerns to restrict state regulatory schemes that focus on the importation of liquor would render section 2 a nullity." *Id.* at 233.[6]

c. The decision below also conflicts with the Fourth Circuit's decision in *Beskind* regarding remedy, and contrary to respondents' repeated assertion, this case does squarely present the remedy question, which has been framed by several decisions. In holding Michigan's law unconstitutional because it permits in-state wineries but not out-of-state wineries to ship alcohol directly to customers' homes, the Sixth Circuit struck down the state's entire regime regulating the importation of wine. *See* Pet. App. 17a, 20a; *see also* Pet. 5, 14. The Fifth Circuit did the same thing to Texas's regime in Dickerson. *See Dickerson*, 336 F.3d at 407-410. The Fourth Circuit, by contrast, preserved North Carolina's

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[6] The decision below also conflicts, albeit in approach and not necessarily in final result, with the Eleventh Circuit's decision in *Bainbridge*. Respondents state that the Eleventh Circuit held that Florida's laws are subject to "something less than strict scrutiny" (Opp. 25 n.14), but its actual holding was that the applicable standard is "*far less* than ... strict scrutiny," *Bainbridge*, 311 F.3d at 1114 n.17 (emphasis added), and the court remanded the case for district court determination whether the Florida statute met its test. There is a clear conflict with the Sixth Circuit's ruling that "strict scrutiny" is "required by Supreme Court precedent." Pet. App. 17a.

overall regime, allowing it to continue to bar imports by anyone other than a licensed in-state wholesaler, and threw out only the regulatory exception that permitted direct shipment by in-state firms. *See Beskind*, 325 F.3d at 517-520.

Respondents' assertion that the Sixth Circuit was "entirely silent on the issue of the appropriate remedy" (Opp. 27) is just wrong. The Sixth Circuit reversed the district court and remanded "the case for entry of judgment in favor of the plaintiffs," who were seeking to invalidate the restriction on imports. Pet. App. 17a, 20a. On petition for rehearing *en banc*, MB&WWA asked the Sixth Circuit to amend its ruling to specify the narrower remedy of striking the in-state-winery exception or leave the issue open for the district court to decide, but the Sixth Circuit did neither, denying the petition without comment. *Id.* at 21a-22a. The issue of remedy is clearly present in this case and ready for this Court's review. As noted, two other circuits have squarely (but inconsistently) addressed the remedy issue, and especially in light of the substantial split of authority on the constitutional issue, the Court would gain nothing by deferring any consideration of these issues until yet another circuit addresses remedy.[7]

4. Respondents' position that these issues are not ripe for review is a lonely one. The petitioners in *Swedenburg*, who have the same interests as respondents here, have characterized the splits as "[m]ultifaceted, [g]rowing, and [i]rreconcilable." *Swedenburg*, No. 03-1274, Pet. 10. The respondents in *Swedenburg*—who ask this Court to review *both Swedenburg and the present case*—agree that there is

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[7] There is an element of gamesmanship in respondents' suggestion that the Court should "wait for a case that presents not only the constitutional question, but also the remedial one." Opp. 28. Since the remedy issue will be reached only in a case where the constitutional issue is decided in respondents' favor, they are tacitly asking the Court to leave them the fruits of their Sixth Circuit victory until they win another victory.

"a substantial conflict among the circuits . . . both as to the mode of analysis and as to the result" and that there is "a compelling need for this Court to review these important issues." *Swedenburg*, No. 03-1274, Br. for Private Resp'ts 7; *see also Swedenburg*, No. 03-1274, Br. for State of N.Y. Resp'ts 7. And 36 state attorneys general and state alcohol beverage regulators (some of whose state statutes allow some form of direct shipping) have filed amicus briefs urging this Court to resolve the circuit conflicts and give states needed guidance regarding how they may constitutionally regulate alcohol imports. *See* No. 03-1116, Br. of *Amici* Ohio and 35 Other States; Br. of *Amici* National Alcohol Beverage Control Ass'n, *et al.*

5. Finally, there is no good reason to grant respondents' suggestion that the Court seek the views of the United States. The United States has no separate interest here and has not chosen to participate on either side, at any stage, in any of the six cases creating the present conflicts. The Federal Trade Commission has claimed no expertise on the unique constitutional questions presented by the Twenty-first Amendment framework for regulating the physical importation of alcohol across state lines.

The issues have been well developed in the circuits. They have been briefed to and considered by six courts of appeals. As some of those courts have themselves indicated, guidance is now needed from this Court. *See Bainbridge*, 311 F.3d at 1112, 1113 n.4 (referring to the interplay between the Twenty-first Amendment and the Commerce Clause as a "never-never land" and opining that "[t]he Supreme Court cases are confusing because many of them implicate different issues and, at the same time, borrow quotations from one another"); Pet. App. 10a ("Since *Bacchus* the Supreme Court has been less than prolific in construing the content of the Twenty-first Amendment's 'core concerns' . . . ."). Further delay would serve no purpose.

## CONCLUSION

For the reasons stated in the petition and this brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 03-1116, No. 03-1120

IN THE

# Supreme Court of the United States

JENNIFER M. GRANHOLM, Governor, *et al.*,
*Petitioner*,

v.

ELEANOR HEALD, *et al.*,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## BRIEF OF THE NATIONAL ALCOHOL BEVERAGE CONTROL ASSOCIATION AND THE NATIONAL CONFERENCE OF STATE LIQUOR ADMINISTRATORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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## QUESTION PRESENTED

Did the Sixth Circuit err in ruling, contrary to decisions by the Second Circuit and Seventh Circuit in similar cases, that a State cannot prohibit the shipment of alcohol beverages from out-of-state producers directly to in-state consumers pursuant to the provisions of the Twenty-First Amendment and the Webb-Kenyon Act, 27 USC §122, while allowing in-state producers to ship directly to consumers?

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IN THE

# Supreme Court of the United States

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No.03-1116, No. 03-1120

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JENNIFER M. GRANHOLM, Governor, *et al.*,
*Petitioner*,

v.

ELEANOR HEALD, *et al.*,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## BRIEF OF THE NATIONAL ALCOHOL BEVERAGE CONTROL ASSOCIATION AND THE NATIONAL CONFERENCE OF STATE LIQUOR ADMINISTRATORS AS *AMICI CURIAE* [1] IN SUPPORT OF PETITIONERS

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Pursuant to Rule 37 of the Rules of this Court, the National Alcohol Beverage Control Association (NABCA) and the National Conference of State Liquor Administrators (NCSLA), by their attorney, file this brief as *amici curiae* supporting the position of the Petitioners and respectfully urge this Court

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[1] Counsel of record for the *amici curiae* was the sole author of this brief. No person or organization other than the *amici curiae* have made a monetary contribution to the preparation or submission of this brief.

to overturn the judgment of the United States Court of Appeals for the Sixth Circuit in *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003). This brief is filed with the consent of the parties, evidence of which is submitted with this brief.

## INTEREST OF *AMICI CURIAE*

NABCA is a Wyoming non-profit corporation whose members are the alcohol beverage regulatory agencies in the 18 states (Alabama, Idaho, Iowa, Maine, Michigan, Mississippi, Montana, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania, Utah, Vermont, Virginia, Washington, West Virginia and Wyoming) that directly control the distribution and sale of alcohol beverages within their borders by means of government-operated wholesale and, in some cases, retail outlets. In addition to the enumerated states, Montgomery County, Maryland is an Active Member of NABCA and the North Carolina Association of ABC Boards and Worcester County, Maryland are Participating Members. These jurisdictions are commonly referred to as "control" jurisdictions.

NABCA member agencies also perform licensing and regulatory functions with regard to private alcohol beverage distribution channels within their jurisdiction. Additionally, these agencies are responsible for the enforcement of laws pertaining to alcohol beverage distribution in the private sector.

NCSLA is an unincorporated organization which represents the remaining 32 states, often called "open" or "license" states. In these jurisdictions, the state government acts only in a licensing, regulatory and/or enforcement capacity, having chosen, pursuant to the Twenty-First Amendment to the U.S. Constitution, to permit the distribution of alcohol beverages to be accomplished entirely by the private sector.

Thus, together, the NABCA and NCSLA member jurisdictions represent all 50 states.

Because statutes similar to the one implicated in the instant case is or has been the subject of litigation in nearly a dozen states across the country and because alcohol beverage regulation has largely been a matter for state, rather than federal government control, the *amici* have a great interest in the outcome of this matter.

## STATEMENT OF THE CASE

Alcohol beverages constitute one of the most highly regulated lawful commodities available in commerce. The American experience with this product includes a history of taxation and regulation dating back to colonial times. With few exceptions—the federal excise tax and the failed experiment of national Prohibition being the prime examples—the regulation of alcohol beverages has taken place at the state level.

The mix of state regulation was recognized as a problem for interstate commerce more than a century ago when Congress adopted the so-called Wilson Act, sometimes referred to as the "Original Packages Act."[2] This law had its flaws, however, and Congress subsequently adopted the Webb-Kenyon Act, which specifically divested alcohol beverages of their interstate commerce protection where the interstate shipment occurred in violation of state laws.[3]

A few years later, the Eighteenth Amendment to the Constitution was ratified, launching a lengthy, but eventually unsuccessful effort at creating a "dry" nation, one totally free of the distribution and sale of alcohol beverages. When the effort failed after a dozen years, Congress adopted and the states ratified the Twenty-First Amendment. This enactment not only repealed the Eighteenth Amendment, but it also, in Section 2,

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[2] 27 USC §121

[3] The Act of Mar. 1, 1913, c. 90, was entitled "An Act divesting intoxicating liquors of their interstate character in certain cases."

declared a clear national policy to carve out an exception to normal Commerce Clause jurisprudence:

> The transportation or importation into any State. . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

And, so there would be no mistake about its intent, following ratification of the Twenty-First Amendment, Congress re-enacted the Webb-Kenyon Act in 1935.[4] The language of that Act, for all practical purposes, is identical to Section 2.

It is against this backdrop that the Sixth Circuit, in the instant case, held that Michigan's statutory provisions treat out-of-state and in-state wineries differently and that the differential treatment did not fall within the so-called "core powers" reserved to the state under the Twenty-First Amendment.

## SUMMARY OF ARGUMENT

NABCA and NCSLA believe that the Sixth Circuit's decision was in error and that this Court should review and ultimately overturn the decision because it ignores the plain language of the Twenty-First Amendment, because it conflicts with a lengthy series of decisions of this Court, because it conflicts with decisions of other circuits in similar cases, and, finally, because the issue is of significant national importance to the alcohol beverage regulatory scheme of the several states.

## I. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH THE PLAIN LANGUAGE OF THE TWENTY-FIRST AMENDMENT AND THE WEBB-KENYON ACT AS WELL AS DECISIONS OF THIS COURT.

The Sixth Circuit's approach was to apply a "traditional" dormant Commerce Clause analysis and, if the state's

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[4] The Act now appears at 27 U.S.C.§ 122.

provisions were found to be unconstitutional, to then determine if they were somehow "saved" by application of the Twenty-First Amendment. NABCA and NCSLA believe that this approach is in error.

As indicated, the plain language of Section 2 of the Twenty-First Amendment could not be clearer with regard to Congressional intent. Nowhere does Section 2, or the Webb-Kenyon Act, which was adopted under Congress' Commerce Clause authority and which both predated and subsequently reaffirmed Section 2, state that the importation of alcohol beverages must comply only with those state laws that treat in-state products in a like manner to the way out-of-state products are treated.

Indeed, this Court has consistently recognized the significance of this language. In one of its earliest pronouncements on the subject, this Court held

> The Twenty-First Amendment sanctions the right of a state to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause. Without doubt a state may absolutely prohibit the manufacture of intoxicants, their transportation, sale, or possession, irrespective of when or where produced or obtained, or the use to which they are to be put.

*Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939)

The Court went on to conclude the greater power to prohibit transportation also includes the lesser power to permit such transportation only under definitely prescribed conditions. "The state may protect her people against evil incident to intoxicants and it may exercise large discretion as to means employed," this Court flatly declared. *Ibid.*, at 138.

In *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964), in which this Court set out a principle of accommodating the Twenty-First Amendment with the Commerce Clause, this Court nevertheless stated that had a

state sought to regulate or control the transportation of the liquor into its jurisdiction until its delivery into another jurisdiction (in this case, a national park), the state "would have been constitutionally permitted to do so."

In *California Retail Liquor Dealers Assn. v. Midcal Aluminum*, 445 U.S. 97 (1980), this Court set out a balancing test between the Twenty-First Amendment and the Commerce Clause, but noted that the test applies only to regulations other than whether to permit importation or sale of liquor and how to structure the liquor distribution system.

Less than a decade later, in *North Dakota v. U.S.*, 495 U.S. 423 (1989), this Court cited *Midcal* in again asserting that states have "virtually complete control" over the importation and sale of liquor and the structure of the distribution system within their jurisdictions.

And, finally, in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), the last instance in which this Court has reviewed the Twenty-First Amendment, this Court once again declared that the Amendment delegated to the states the power "to prohibit commerce in" alcohol beverages.

Thus, put quite simply, the Sixth Circuit misapplied the law in this case and departed from the settled interpretations of this Court with regard to the importation of alcohol beverages. While a Commerce Clause analysis may have a place with regard to "other regulations," NABCA and NCSLA submit that it has no place in consideration of state laws which regulate, or even prohibit the importation of alcohol beverages.

## II. THE SIXTH CIRCUIT DECISION CONFLICTS WITH DECISIONS OF THE SECOND AND SEVENTH CIRCUITS CONCERNING A REGULATORY SCHEME THAT IS VIRTUALLY IDENTICAL TO THE ONE IN THE INSTANT CASE.

As further rationale as to why this Court should review the Sixth Circuit's decision, NABCA and NCSLA note that it conflicts squarely with a unanimous decision of the Seventh Circuit in a case involving virtually the same regulatory scheme. *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000), cert. denied sub nom. *Bridenbaugh v. Carter*, 532 U.S. 1002 (2001).

In that case, Judge Easterbrook wrote that Indiana's ban on direct shipments of wine from outside the state to consumers within the state was a valid exercise of Indiana's plenary power under the Twenty-First Amendment, which, he noted, directly authorizes states to "control alcohol in ways that it cannot control cheese."

> No longer may the dormant commerce clause be read to protect interstate shipments of liquor from regulation; § 2 speaks directly to these shipments. Indeed all "importation" involves shipments from another state or nation. *Every* use of § 2 could be called "discriminatory" in the sense that plaintiffs use that term, because every statute limiting importation leaves intrastate commerce unaffected. If that were the sort of discrimination that lies outside state power, then § 2 would be a dead letter.
>
> No decision of the Supreme Court holds or implies that laws limited to the importation are problematic under the dormant commerce clause.

*Ibid.*, 227 F.3d at 853.

Subsequent to the Sixth Circuit's decision, a unanimous panel in the Second Circuit, after an extensive discussion of the history of the Twenty-First Amendment and the decisions of this Court, concluded that the statutory scheme in New York, as in Michigan, regulated only the importation into and distribution of alcohol within the state and the statute fell within the ambit of the powers granted to states by the Twenty-First Amendment. The state's regime, said the panel, targets "valid state interests in controlling the importation and transportation of alcohol." *Swedenburg, et al. v. Kelly, et al.*, Nos. 02-9511, 02-7089 Con (Slip Op. 2nd Cir. Feb. 12, 2004), 2004 WL 254401.

If the Sixth Circuit's opinion is allowed to stand, there will be differing rules in differing circuits as to the manner in which states are allowed to regulate or control the importation of alcohol beverages, leading to the same confusion and inconsistency in state laws that this Court and Congress sought to resolve beginning more than a century ago.

## III. THIS CASE HAS SIGNIFICANT NATIONAL IMPORTANCE.

As indicated, alcohol beverages constitute one of the most heavily regulated and taxed lawful products traveling in commerce today. Not everyone can sell alcohol beverages. Producers, importers and wholesalers must apply for and be granted a federal Basic Permit by the Alcohol and Tobacco Tax and Trade Bureau, an agency of the Department of the Treasury. They, like brewers and retailers, must also be licensed by the states (one or more) in which they propose to do business; the licensing process often involves an extensive criminal background check.

And not everyone can buy alcohol beverages. Purchasers in every state must be twenty-one years of age or older. In many states, on-premises retailers (e.g., restaurants, taverns, and bars)

are prohibited from selling alcohol beverages to any adult who is or who appears to be intoxicated.

The only way a state can insure compliance with its laws is to have a system of accountability, with penalties associated with violations of state law. Accountability can only occur if the states have the ability to reach the seller, i.e., if the seller has some kind of presence in the state to justify jurisdiction and enforcement. Without accountability, there can be no effective regulation. Upholding the Sixth Circuit's decision would undermine accountability and create what some have called "alcohol anarchy."

Some states have chosen to permit direct shipping of alcohol beverages, but only under carefully controlled circumstances. That is their right under the Twenty-First Amendment. But no state allows unlimited and unregulated direct shipping. For them and for the states like Michigan and more than two dozen others which have opted to secure accountability through other means and which ban the interstate direct shipment of alcohol beverages, this case has enormous importance.

If the Sixth Circuit's decision is upheld, how are states going to effectively keep alcohol beverages out of the hands of minors? A recent federally-funded study suggests that the problem of internet alcohol beverage purchases is so great that "an argument can certainly be made for banning Internet and home delivery sales altogether in light of the likelihood that these methods will be used by underaged purchasers."[5]

If the Sixth Circuit's decision is upheld, how are states going to effectively collect the taxes that are due on alcohol beverage sales? This Court's decision in *Quill v. North Dakota*, 504 U.S. 298 (1992) makes it clear that attempts to require out-of-state

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[5] *Reducing Underage Drinking: A Collective Responsibility*. Richard J. Bonnie and Mary Ellen O'Connell, Editors. National Research Council and Institute of Medicine (2003), at 176.

sellers to remit sales, and possibly other, taxes place impermissible burdens on interstate commerce that only Congress can rectify.

If the Sixth Circuit's decision is upheld, how are states going to insure that alcohol beverages do not reach "dry" areas where residents have determined that they do not wish the sale of alcohol beverages to occur?

As indicated, the issues surrounding this case have been, and are being litigated across the country. Decisions have been rendered in the Fourth Circuit,[6] Fifth Circuit[7] and Eleventh Circuit.[8] Cases are currently pending at the trial level in Arizona,[9] New Jersey,[10] Ohio[11] and Rhode Island.[12] Other states are potential targets of similar litigation. A clear mandate from this Court is needed to avoid further inconsistency and conflict.

The cornerstone of alcohol beverage regulation in this country has always been that it is up to the states—not the federal government or the federal judiciary—to regulate the importation and transportation of alcohol beverages into their jurisdictions. This is not a case about a few oenophiles wanting to buy fine wine that might not otherwise be available in their community, or other purchasers wanting the convenience of sitting at their computers and ordering on-line, the way they order books and apparel. Alcohol beverages and their regulation are *sui generis* and should remain that way.

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[6] *Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003) and *Bolick v. Danielsen*, 330 F.3d 274 (4th Cir. 2003).

[7] *Dickerson v. Bailey*, 336 F.3d 274 (5th Cir. 2003).

[8] *Bainbridge v. Turner*, 311 F.3d 1104 (11th Cir. 2002).

[9] *Parker v. Morrison*, No. 2:03-cv-01948 (D. Ariz.).

[10] *Freeman v. McGreevey*, No. 2:03-cv-03140 (D. N.J.).

[11] *Stahl v. Taft*, No. 2:03-cv-00597 (S.D. Ohio).

[12] *Wolfson v. Carcieri*, No. 1:03-cv-00463 (D. R.I.).

## CONCLUSION

For the reasons stated above, it is urged that this Court reverse the opinion of the United States Court of Appeals for the Sixth Circuit and declare that, pursuant to the Twenty-First Amendment and 27 U.S.C. § 122, states have the right to prohibit the direct shipment of alcohol beverages from out-of-state sources even when they permit in-state suppliers to ship directly.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

JENNIFER M. GRANHOLM, Governor of Michigan; *et al.*,
*Petitioners*,

and

MICHIGAN BEER AND WINE WHOLESALERS ASSOCIATION,
*Petitioners*,

v.

ELEANOR HEALD, *et al.*,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## BRIEF OF NATIONAL BEER WHOLESALERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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## PARTIES TO THE PROCEEDINGS

Petitioners, Defendant-Appellees below, are State of Michigan officials including the Governor, the Michigan Attorney General, and the Chair of the Liquor Control Commission (hereafter collectively referred to as "Michigan" or the "State"). The current holders of those offices have been substituted as parties for the former office holders pursuant to Sup. Ct. R. 35.3.

Petitioner, intervening Defendant-Appellee below, is the Michigan Beer & Wine Wholesalers Association ("MB&WWA"), a trade association of the Michigan beer and wine wholesalers that intervened as a defendant in the district court.

Respondents, Plaintiffs-Appellants below, include Eleanor Heald, Ray Heald, John Arundel, Karen Brown, Richard Brown, Bonnie McMinn, Gregory Stein, Michelle Morlan, William Horwath, Margaret Christina, Robert Christina, Trisha Hopkins, Jim Hopkins and Domaine Alfred, Inc. The thirteen individual parties are Michigan residents who are wine connoisseurs, wine journalists, and wine collectors. Respondent Domaine Alfred, Inc. is a California winery.

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IN THE

# Supreme Court of the United States

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Nos. 03-1116, 03-1120

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JENNIFER M. GRANHOLM, Governor of Michigan; *et al.*,
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MICHIGAN BEER AND WINE WHOLESALERS ASSOCIATION,
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---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

---

## BRIEF OF NATIONAL BEER WHOLESALERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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## INTEREST OF *AMICUS CURIAE*

Since 1938, the National Beer Wholesalers Association ("NBWA") has served as the national membership organization of the beer wholesaling industry representing over 2,200 licensed beer wholesalers.[1] Its members reside in all fifty states. In 1997, U.S. beer wholesaler direct sales

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[1] This *amicus curiae* brief filed in support of the Petitioners was funded solely by the National Beer Wholesalers Association and authored solely by counsel for the National Beer Wholesalers Association. This brief is filed with the consent of the parties, evidence of which is submitted with this brief.

reached $30.5 Billion Dollars. Beer wholesalers employed 92,860 individuals and paid $3.4 Billion Dollars in wages. The total economic activity directly generated by beer wholesalers was $8.2 Billion Dollars. The total state and local taxes paid directly by beer wholesalers was $2.4 Billion Dollars. *See Beer Wholesalers: Their Role and Economic Performance*, at 46-47 (3d ed. 1999).

The economic activity of distributing beer stimulates other activity in the economy. Economists refer to this as the "multiplier effect". In other words, every dollar spent by wholesalers to buy such things as vehicles, equipment, computers and other goods and services represents income to other industries. Taking into account the "multiplier effect", the total direct and indirect economic contribution of beer wholesalers nationwide in 1997 was as follows: 368,010 jobs created, $10.2 Billion Dollars in wages paid, $28.4 Billion Dollars in total economic activity created, and $4.0 Billion Dollars in state and local taxes paid. *Id.* at 47. Obviously, the economic contribution of beer wholesalers is even greater today.

This case implicates the essential interests of NBWA and its members. The Sixth Circuit decision in *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003) threatens to dismantle complex state regulatory systems governing alcoholic beverages that have worked remarkably well for over seventy (70) years. Through these delicately balanced and historically tested regulatory schemes, states have addressed several fundamental interests: preventing illegal sales to minors, inhibiting overly aggressive marketing and consumption, collecting taxes, creating orderly distribution and importation systems, and preventing a recurrence of the problems that led to the enactment of National Prohibition.

Specifically, the *Heald* decision puts at risk the requirement that all imported alcoholic beverages be delivered to an in-state licensee, thereby assuring effective regulation. Ordi-

narily, wholesalers are the in-state licensed entities through which imported alcoholic beverages must pass. Wholesalers pay excise taxes on imported product and retain records of their sales to retailers, thereby creating a transparent and accountable distribution system. They have invested large sums in creating these distribution systems in a highly regulated environment. These investments are jeopardized if the regulatory playing field is tipped against in-state licensees and out-of-state entities are permitted to ship directly to consumers.

## SUMMARY OF ARGUMENT

By every test used by this Court, the Petition for Writ of Certiorari should be granted. First, there is substantial conflict among the federal circuits regarding the scope of a state's right to regulate the importation of alcoholic beverages under the Twenty-first Amendment to the United States Constitution. Specifically, the Sixth Circuit decision, as well as a similar decision in the Fifth Circuit, conflicts with decisions in the Second, Fourth, Seventh, and Eleventh Circuits. *See Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003); *Dickerson v. Bailey*, 336 F.3d 388 (5th Cir. 2003); *Swedenburg v. Kelly, et al.*, 2004 WL 254401 (2nd Cir. Feb. 12, 2004); *Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003); *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000), *cert. denied sub. nom.*, *Bridenbaugh v. Carter*, 532 U.S. 1002 (2001); *Bainbridge v. Turner*, 311 F.3d 1004 (11th Cir. 2002).

Second, the Sixth Circuit decision conflicts with (and essentially ignores) the Twenty-first Amendment, the Webb-Kenyon Act, 27 U.S.C. § 122, and numerous decisions of this Court, including, without limitation, *State Bd. Of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936), *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964) and *North Dakota v. United States*, 495 U.S. 423 (1990).

Finally, the issues involved in the *Heald* case are of nationwide importance, as evidenced by the number of cases devoted to these issues. Fundamentally, the case involves the right of states to control and regulate the importation of alcoholic beverages into and within their borders. In recognition of historical abuses and of the social costs that flow from intemperate consumption, alcohol is one of the most heavily regulated products in the country and is accorded a unique status under our Constitution. As such, states are free to regulate the product in accordance with community norms and standards.

The *Heald* decision erodes, indeed destroys, the primary keystone of state regulatory power, namely the right under the Twenty-first Amendment to control the importation of alcoholic beverages into the State and insist on importation and distribution through licensed entities with a physical presence in the state. Without apparent regard to the consequences of its decision, the *Heald* case makes a Trojan Horse of one minor Michigan statutory provision which permits in-state wineries (which are subject to the licensing authority of the state), but not out-of-state wineries (which are outside the regulatory reach of the state), to ship direct to consumers, and thereby topples a comprehensive three-tier system governing alcoholic beverage distribution. Furthermore, the remedy not only undermines effective regulation, but discriminates against licensed in-state wholesalers and retailers, since they, unlike unlicensed out-of-state suppliers, are subject to enforceable regulations and taxation. In doing so, the Sixth Circuit decision ignored (or at least rendered irrelevant) the Twenty-first Amendment (which represents a national consensus reached by the American people just seventy years ago), a long line of decisions by this Court recognizing a state's fundamental and constitutional right to regulate alcoholic beverages, and an Act of Congress (the Webb-Kenyon Act) which explicitly grants states that right.

## ARGUMENT

### I. THERE IS A SUBSTANTIAL CONFLICT AMONG THE FEDERAL CIRCUITS REGARDING A STATE'S RIGHT TO REGULATE THE IMPORTATION OF BEVERAGE ALCOHOL UNDER THE TWENTY-FIRST AMENDMENT.

As noted and discussed in the Petitioners' Briefs in Support of Petition for Writ Of Certiorari, the Sixth Circuit's decision conflicts directly with decisions of the Seventh, Eleventh, and Fourth Circuit. *See Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003); *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000), *cert. denied sub. nom., Bridenbaugh v. Carter*, 532 U.S. 1002 (2001); *Bainbridge v. Turner*, 311 F.3d 1104 (11th Cir. 2002); *Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003). This conflict in and of itself justifies review by the Court.

Since the submittal of Petitioners' Briefs, the Second Circuit Court of Appeals rendered its decision in *Swedenburg v. Kelly, et. al.*, 2004 WL 254401 (2d Cir. Feb. 12, 2004). In a thoughtful and historically grounded analysis, the *Swedenburg* court, like the Seventh Circuit in *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000), *cert. denied sub. nom., Bridenbaugh v. Carter*, 532 U.S. 1002 (2001), upheld state laws regulating the importation of alcoholic beverages by requiring that they pass through an in-state licensee. The *Swedenburg* court noted that "'[b]oth the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution,' and considers each 'in the light of the other, and in the context of the issues and interests at stake in any concrete case.'" *Swedenburg, supra*, at 4 (quoting in part *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964)). The court focused upon "the scope of the Twenty-first Amendment's grant of authority such that it is exempted from the effect of the dormant Commerce Clause." *Id.* This approach in consistent with the decisions of this

Court, which has never, by decision or language, suggested any contrary mode of analysis when evaluating regulations governing the importation of alcoholic beverages.

Significantly, the Second Circuit upheld New York's regulatory scheme even though it prohibited out-of-state wineries from importing and selling wine directly to consumers, while it permitted local wineries to do so. The Second Circuit expressly rejected the two-step analysis utilized by the Fifth, Sixth, and Eleventh Circuits. In pertinent part, the Sixth Circuit employed traditional dormant Commerce Clause analysis. First, the Sixth Circuit examined whether the regulation in question "affects interstate commerce in a manner either that (i) discriminates against interstate commerce, or (ii) imposes burden on interstate commerce that are in commensurate with putative local gains." *Swedenburg v. Kelly, et al.*, 2004 WL 254401, at 4 (2d Cir. Feb. 12, 2003) (quoting *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 208 (2d Cir. 2003)). Second, concluding that the regulation in question failed to pass muster, the Sixth Circuit examined whether the regulation in question implicated one of the Twenty-first Amendments "core concerns". If so, it may be "saved", notwithstanding its discriminatory effect. *Id.* As noted by the *Swedenburg* court, however, this analysis ignored (or at least rendered irrelevant) the express language of the Twenty-first Amendment, the Webb-Kenyon Act, and numerous decisions of this Court. *Swedenburg, supra*, at 4-5.

## II. THE *HEALD* DECISION CONFLICTS WITH THE EXPRESS LANGUAGE OF THE TWENTY-FIRST AMENDMENT, THE WEBB-KENYON ACT, AND DECISIONS OF THE UNITED STATES SUPREME COURT.

### A. History Of The Twenty-first Amendment And Webb-Kenyon Act

Until the late nineteenth century, alcoholic beverages were normally regulated at the local level. Ultimately, for a variety

of reasons, local regulation failed. Thereafter, states attempted to regulate alcoholic beverage distribution and sales. *See* Raymond B. Fosdick & Albert L. Scott, *Tavard Liquor Control*, 10-11 (1933); Leonard Havion & Elizabeth Laine, *After Repeal*, 6-7 (1936). These efforts were "thwarted by Supreme Court decisions involving the doctrine now known as the Commerce Clause." *Swedenburg*, *supra*, at 5 (citing *Bowman v. Chicago & NW Ry Co.*, 125 U.S. 465 (1888); *Leisy v. Hardin*, 135 U.S. 100 (1890)). States were freed from this constraint by the Webb-Kenyon Act, which was held constitutional in 1917. *Clark Distilling Co. v. Western Maryland Railway Co.*, 242 U.S. 311 (1917). Until the passage of the Webb-Kenyon Act, states were effectively unable to impose their own systems for the regulation of the distribution and sale of alcoholic beverages. To do so required, and still requires, control of importation. Otherwise, orderly markets are destroyed by competition from unlicensed, unregulated, and untaxed out-of-state competitors. States never had the opportunity to demonstrate that, after the passage of the Webb-Kenyon Act, they could effectively regulate the importation, distribution and sale of alcoholic beverages. This was because of the adoption of National Prohibition in 1919. The ultimate failure of Prohibition showed that federal regulation of the distribution and sale of alcoholic beverages, without regard to local norms and standards, was also ineffective.

By 1933, it was evident to a majority of Americans that National Prohibition was a failed experiment. Subsequently, the nation ratified the Twenty-first Amendment, which represents a constitutional commitment to make permanent the policy behind the Webb-Kenyon Act: that the state be the focus of alcoholic beverage control. Leonard Harrison and Elizabeth Laine, *After Repeal*, 6-8, (1936). As observed by the *Swedenburg* court, Section 2 of the Twenty-first Amendment "effectively constitutionalizes most state prohibitions regulating importation, transportation, and distribution of

alcoholic beverages from the stream of interstate commerce in to the state." *Swedenburg v. Kelly, et al.*, 2004 WL 254401, at 6 (2d Cir. Feb. 12, 2004) (quoting in part *Craig v. Boren*, 429 U.S. 190, 205-206 (1976)). Expressed in another way, Section 2 grants "the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *California Retail Liquor Dealers Ass'n v. Mid Cal Aluminum, Inc.*, 445 U.S. 97, 110 (1980).

The Twenty-first Amendment embeds the Webb-Kenyon Act in the Constitution of the United States. *Craig v. Boren*, 429 U.S. 190, 205-206 (1976). By its decision, the *Heald* court rendered the Amendment essentially meaningless. However, "[t]he Amendment was not a narrow legislative delegation of federal authority; it was the will of a nation speaking through its constitutional process." *Swedenburg, supra*, at 4.

### B. The *Heald* Decision Is Inconsistent With Prior Decisions Of This Court Interpreting The Twenty-First Amendment.

Shortly after its enactment, this Court recognized the broad powers conferred upon the states by the Amendment. *See, e.g., State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936) (upholding a statute that imposed a license fee on beer importers); *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938) (upholding a limitation on the types of blended spirits imported into the state, which was not imposed upon those produced in state); *Ziffrin v. Reeves*, 308 U.S. 132 (1939) (upholding regulation of the exportation of alcoholic beverages out of the state). Specifically, these cases upheld the states' power to regulate alcoholic beverages even when it burdens out-of-state interests vis-à-vis in-state interests. *Id.* The common thread running through these decisions is the recognition that control of importation is the essential component of the states' licensing and regulatory authority

and that the Twenty-first Amendment insulates that power from dormant Commerce Clause challenge and from claims of discriminatory treatment.

The Sixth Circuit, calling citation to earlier Twenty-first Amendment decisions "disingenuous," declared that this Court rejected these earlier decisions in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964) and *Bacchus Imports, Ltd. v. Dias*, 408 U.S. 263 (1984). Contrary to the Sixth Circuit's understanding, however, *Hostetter* and *Bacchus* do not constitute the rejection of this Court's earlier jurisprudence. In *Hostetter*, New York attempted to close down an airport duty free shop, whose products were delivered to the ultimate consumer just prior to boarding and were used abroad. This Court simply held that such distribution did not fall within the express terms of the Twenty-first Amendment since consumption would not occur within the state.

In *Bacchus*, Hawaii had exempted from taxation two locally produced products, ti root brandy and pineapple wine. The exemptions had explicitly been passed and were explicitly defended by the state as exclusively motivated by a desire to aid local industry. The Twenty-first Amendment was not even cited by Hawaii until it submitted its brief to this Court. Writing the majority opinion, Justice White found this "belated" argument unconvincing.

*Hostetter* and *Bacchus* each presented an unusual set of facts. These cases simply did not implicate the states' interests under the Twenty-first Amendment. Certainly, no aspect of the ruling in these cases provided a carte blanche for lower federal courts to recast Twenty-first Amendment analysis or discard state regulatory schemes governing the importation, sale and distribution of alcoholic beverages. Furthermore, as noted by the *Bridenbaugh* and *Swedenburg* courts, nothing in these cases mandated dormant Commerce Clause or "core power" analysis when considering challenges to state impor-

tation regulation or to requirements that alcoholic beverages be distributed through in-state licensed entities. *See Swedenburg, supra*, at 17-21; *Bridenbaugh supra*, at 851-854; *but see Heald v. Engler*, 342, F.3d 317, 324 (6th Cir. 2003).

This Court has consistently reaffirmed the right of states under the Twenty-first Amendment to control the importation of alcoholic beverages. In *North Dakota v. United States*, 495 U.S. 423 (1990), the Court upheld labeling and reporting requirements for alcoholic beverages shipped to military bases, under concurrent jurisdiction. Justice Stevens wrote that "within the area of its jurisdiction, the state has 'virtually complete control' over the importation and sale of liquor and the structure of the liquor distribution system. *Id.* at 431; *see California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980); *see also Capital Cities Cable, Inc. v. Crisp*, 476 U.S. 694, 712 (1984); *California Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936)." He further noted that "[i]n the interest of promoting temperance, ensuring orderly markets conditions, and raising revenue, the state established a comprehensive system for the distribution of liquor within its borders. That system is unquestionably legitimate." *North Dakota v. United States*, 495 U.S. 423, 432 (1990) (citing *Carter v. Virginia*, 321 U.S. 131 (1944) and *State Board of Equalization v. Young's Market, Co.*, 299 U.S. 59 (1936)).

The *Heald* Court either ignored or misinterpreted this Court's Twenty-first Amendment jurisprudence. This Court has repeatedly reaffirmed the principle that the Twenty-first Amendment authorized each state to regulate alcoholic beverages within its borders and that the Twenty-first Amendment creates "an exception to the normal operation of the Commerce Clause." *Craig v. Boren*, 429 U.S. 190, 206, n. 11 (1976).

## III. THE ISSUES INVOLVED IN THE *HEALD* CASE ARE OF NATIONAL IMPORTANCE.

The *Heald* decision cripples the ability of the state to regulate alcoholic beverages by proscribing the power to control importation. In Michigan, state law requires out-of-state wineries (which are not licensed and are not subject to effective control by the state) to sell only to licensed entities. The law permits in-state wineries (which are licensed and are subject to effective control by the state) to sell, under certain circumstances, direct to consumers. Relying upon inapposite dormant Commerce Clause analysis, the Sixth Circuit found this differential treatment fatally defective, struck down the direct shipment prohibition, and essentially ignored both the Twenty-first Amendment and the effect of its decision upon complex, state regulatory systems.

While this case may involve oenophiles, it is constitutionally indistinguishable from one involving spirits or beer. There is no distinction between the importation of a highly allocated cult wine and that of an alcopop or distilled spirits. How are regulators expected to effectively police underage sales when a resourceful teenager can order distilled spirits through the mail? A state cannot effectively hold an out-of-state licensed entity accountable for such a violation of state law. Is state regulation at risk because of the existence of brew-pubs, since in-state suppliers are permitted to sell on-premise? Similarly, the logic of the opinions would further seem to apply to importation controls that result in any difference between an in-state licensee and an unlicensed out-of-state supplier, even where the purpose of that importation control is to ensure compliance with state law by requiring that all importation be to a licensed entity physically present within the state. As noted by the Second Circuit, "[p]resence ensures accountability." *See Swedenburg v. Kelly, et al.*, 2004 WL 25 4401, at 10 (2nd Cir. Feb. 12, 2004) ("all [suppliers] must either utilize the three-tier system or obtain a physical

presence from which the state can monitor and control the flow of alcohol.") Licensed, physical presence of at least one party in the chain of distribution is the cornerstone of an orderly, transparent, and accountable alcoholic beverage distribution system, and its validity has never been questioned by this Court.

The Sixth Circuit also ignores the competitive advantage that its decision confers upon out-of-state suppliers. By effectively exempting out-of-state suppliers from the regulatory reach of the state, these suppliers are free to violate a state's laws without fear of consequences. Accordingly, the inequitable outcome of the decision will be that out-of-state suppliers are accorded a benefit not enjoyed by in-state suppliers, while at the same time, states are hamstrung in the effective enforcement of their laws over out-of-state suppliers.

Finally, the *Heald* decision is of national significance because it apparently eliminates in their entirety the provisions of Michigan law which require imported alcoholic beverages to be delivered to in-state licensed entities. This remedy is ungrounded in law and unnecessarily destructive of an effective, comprehensive, and long-established state regulatory system. In *Beskind*, the Fourth Circuit found unconstitutional North Carolina's "juxtaposition" of a prohibition on direct shipments from out-of-state wineries with an exception for such shipments from in-state wineries. The Court, however, struck down only the in-state exception and left "in place the three-tiered system that North Carolina had employed since 1937 and has given every indication it wants to continue to employ." *See Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003). The Sixth Circuit ruling runs afoul of the principle that a constitutionally flawed provision must be severed from the remainder of the statute and the statute maintained insofar as it is valid. *See, e.g. Leavitt v. Jane L.*, 518 U.S. 137 (1996); *Denver Area Educational Telecommu-*

*nications Consortium, Inc. v. FFC*, 518 U.S. 727 (1996); *Buckley v. Valeo*, 424 U.S. 108 (1976). One small exception to the three-tier system of distribution, even if constitutionally invalid, does not call for the dismantling of Michigan's regulatory scheme by eliminating an even-handed and essential requirement that all alcoholic beverages consumed in Michigan pass through or originate from a licensee physically present within the state.

## CONCLUSION

For the reasons set forth above, Amicus Curiae NBWA respectfully requests that the Court grant the Petition for a Writ of Certiorari.

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IN THE SUPREME COURT OF THE UNITED STATES

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JENNIFER M. GRANHOLM, et al.,
Petitioners,

v.

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CHIGAN BEER & WINE WHOLESALERS ASSOCIATION,
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v.

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JUANITA SWEDENBURG, et al.,
Petitioners,

v.

EDWARD D. KELLY, et al.,
Respondents.

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n Writs of Certiorari to the United States
Courts of Appeals for the Second and Sixth Circuits

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**MOTION TO REALIGN PARTIES FOR PURPOSES OF BRIEFING, TO SET BRIEFING SCHEDULE FOR PARTIES AND AMICI, AND FOR EXTENSION OF TIME TO FILE BRIEFS**

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The States of Michigan and New York (petitioner in No. 03-1116 and respondent in No. 03-1274, respectively), together with petitioner in No. 03-1120 and all private respondents in No. 03-

1274, respectfully move this Court for an order realigning the parties in these consolidated cases (for purposes of briefing), setting a briefing schedule for parties and amici, and extending the time within which to file the parties' and amici's merits briefs.

1. On May 24, 2004, this Court granted three certiorari petitions arising from two different decisions from two courts of appeals: Granholm v. Heald (No. 03-1116; arising from the Sixth Circuit), MI Beer & Wine Wholesalers v. Heald (No. 03-1120; arising from the Sixth Circuit), and Swedenburg v. Kelly (No. 03-1274; arising from the Second Circuit). This Court consolidated the cases and limited review to the following question: "Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of Sec. 2 of the 21st Amendment?"

2. Because the Second and Sixth Circuits respectively upheld and struck down New York's and Michigan's regulatory schemes, the public and private parties who seek to answer the question framed by this Court's order granting certiorari in the affirmative (hereinafter the statutes' "Challengers"), and their respective amici, will, under the ordinary operation of the Court's rules, be required to file as petitioners if they are in

the Second Circuit case and as respondents if they are in the Sixth Circuit case. Conversely, the public and private parties who would answer this Court's question in the negative (hereinafter the statutes' "Supporters") and their respective amici, will, under the ordinary operation of the Court's rules, be required to file as petitioners in the Sixth Circuit case and as respondents in the Second Circuit case.

3. Although the Michigan and New York statutes are different in respects that would make consolidated briefing infeasible, Movants believe that the Court will nonetheless benefit from coordination of arguments between parties and amici on each side of the question the Court has framed. Such coordination would be quite difficult if the Court were not to adopt a consolidated briefing schedule that realigns the parties to create conformity of posture and interests. Without such relief, parties who would be making substantively similar arguments would file their merits briefs at markedly different times, some as petitioners and some as respondents. In addition, amici on both sides of the question the Court has framed may choose to file with the respondents (in whichever case they agree with the respondents), which would disserve the Court by making it harder for Challengers and Supporters to address amici's arguments in an orderly fashion.

4. Movants submit that the question formulated by this Court's order granting certiorari suggests that those who assert the invalidity of Michigan's and New York's statutory schemes—*i.e.*, that those statutes "violate the dormant Commerce Clause in light of Sec. 2 of the 21st Amendment"—should be required to set forth the bases for their challenge first. Movants therefore submit that Challengers and their amici should be realigned as petitioners for purposes of briefing these consolidated cases. Since that realignment, without more, would deprive (current) petitioners in Nos. 03-1116 and 03-1120 of the right to submit a reply brief—granting that right instead to (current) respondents in those cases—the Court should permit *both* Challengers and Supporters to submit reply briefs.

5. Movants also believe that a 21-day extension of the time within which to file the principal opening briefs for both Challengers and Supporters (and for amici supporting each party) will help the parties and amici better coordinate their efforts and will not prejudice the Court's timely consideration of these cases during October Term 2004.

6. In light of the foregoing, Movants respectfully request that this Court issue a scheduling order in these consolidated cases that directs Challengers (Swedenburg et al., petitioners in No. 03-1274, and Heald et al., respondents in No. 03-1116 and No. 03-1120) and Supporters (respondents in No. 03-1274 and

petitioners in No. 03-1116 and No. 03-1120) and their respective amici to file briefs on the merits, as well as reply briefs, in the following order:

(a) Opening Briefs for Challengers and their respective amici to be filed on or before July 29, 2004.

(b) Opening Briefs for Supporters and their respective amici to be filed on or before September 23, 2004.

(c) Challengers' Reply Briefs to be filed on or before October 28, 2004.

(d) Supporters' Reply Briefs to be filed on or before November 22, 2004.

7. Counsel for private respondents in No. 03-1274 contacted counsel for each Supporter and Challenger to ascertain their respective positions with respect to the relief sought by this motion. All parties in these cases support this motion, with two exceptions. First, Kenneth W. Starr, Esq., one of the counsel for respondents in Nos. 03-1116 and 03-1120, advised us that his clients oppose any realignment of parties and all other relief sought by Movants, with the exception of extensions of time to file the parties' principal briefs. Second, Clint Bolick, Esq., Counsel of Record for petitioners in No. 03-1274 advised us that he objects to the relief sought by Movants only

insofar as any order realigning parties would also permit Supporters to file a reply brief.

Respectfully submitted,

Miguel A. Estrada, by permission, on behalf of all movants.


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Nos. 03-1116 & 03-1120

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

JENNIFER M. GRANHOLM, GOVERNOR OF MICHIGAN, *et al.*,
*Petitioners,*

*v.*

ELEANOR HEALD, *et al.*,
*Respondents.*

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,
*Petitioner,*

*v.*

ELEANOR HEALD, *et al.*,
*Respondents.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

## JOINT APPENDIX

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United States District Court, No. 00-CV-71438-DT, Order Denying Plaintiffs' Motion for Reconsideration dated November 5, 2001 ..... *38a* **39a**

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Sixth Circuit Court of Appeals, No. 01-2720, Judgment dated August 28, 2003 ..... *19a* **19a**

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**U.S. DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN (DETROIT)**
**CIVIL DOCKET FOR CASE #: 2:00-CV-71438-BAF**

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| Filing Date | # | Docket Text |
|---|---|---|
| 03/22/2000 | 1 | COMPLAINT with - Receipt # 396367 - Date Fee Received: 3/22/00 (PP) (Entered: 03/24/2000) |
| 04/13/2000 | 2 | APPEARANCE for defendants John Engler, Jennifer M. Granholm and Jacquelyn Stewart of attorney Irene M. Mead (DT) (Entered: 04/14/2000) |
| 04/13/2000 | 3 | ANSWER by defendants John Engler, Jennifer M. Granholm and Jacquelyn Stewart to complaint [1-1] (DT) (Entered: 04/14/2000) |
| 04/13/2000 | 3 | AFFIRMATIVE defenses by John Engler, Jennifer M. Granholm, Jacquelyn Stewart (DT) (Entered: 04/14/2000) |
| 04/13/2000 | 4 | PROOF of mailing by John Engler, Jennifer M. Granholm, Jacquelyn Stewart of attorney appearance, answer to complaint and affirmative defenses (DT) (Entered: 04/14/2000) |
| 05/01/2000 | 5 | MOTION by movant MI Beer Wine Whlse to intervene as defendant with brief, exhibit "A", proof of mailing and notice of hearing (lh) (Entered: 05/03/2000) |
| 05/02/2000 | 6 | SUMMONS returned executed by process server on 3/29/00 - answer due 4/18/00 for Jennifer M. Granholm (lh) (Entered: 05/03/2000) |

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|---|---|---|
| 05/02/2000 | 7 | SUMMONS returned executed by process server on 3/31/00 - answer due 4/20/00 for Jacquelyn Stewart (lh) (Entered: 05/03/2000) |
| 05/02/2000 | 8 | SUMMONS returned executed by process server on 3/29/00 - answer due 4/18/00 for John Engler (lh) (Entered: 05/03/2000) |
| 05/02/2000 | 9 | ORDER by Judge Bernard A. Friedman referring motion to intervene as defendant by MI Beer Wine Whlse [5-1] to Magistrate Judge Marc L. Goldman for hearing and determination [EOD Date 5/3/00] (lh) (Entered: 05/03/2000) |
| 05/03/2000 | 10 | EXPARTE motion by plaintiff to permit admission Pro Hac Vice of Robert D Epstein, Jeffrey L Marchal and James A Tanford with affidavits, notice of entry of ex parte order, of mailing and notice of hearing (lh) (Entered: 05/04/2000) |
| 05/04/2000 | 11 | NOTICE by court setting hearing date on motion to intervene as defendant by MI Beer Wine Whlse [5-1] for 1:30 5/30/00 (lh) (Entered: 05/04/2000) |
| 05/15/2000 | 12 | RESPONSE by defendants John Engler, Jennifer M. Granholm, Jacquelyn Stewart to motion to intervene as defendant by MI Beer Wine Whlse [5-1] with proof of mailing (dh) (Entered: 05/15/2000) |
| 05/16/2000 | 13 | RESPONSE by plaintiffs to motion to intervene as defendant by MI Beer Wine Whlse [5-1] with brief, proof of mailing (dh) (Entered: 05/17/2000) |
| 05/22/2000 | 14 | REPLY BRIEF by MI Beer Wine Whlse to responses to motion to intervene as defendant by MI Beer Wine Whlse [5-1] (DT) (Entered: 05/23/2000) |

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|---|---|---|
| 05/30/2000 | 15 | NOTICE by Judge Friedman's chambers of setting scheduling conference for 9:30 6/22/00 (PP) (Entered: 05/31/2000) |
| 05/30/2000 | | MOTION hearing held on motion to intervene as defendant by MI Beer Wine Whlse [5-1] - disposition: taken under advisement - Magistrate Judge Marc L. Goldman - tape #: 5/30/00 (gw) (Entered: 05/31/2000) |
| 06/15/2000 | 16 | MOTION by defendants for summary judgment with notice, brief and proof of mailing (ew) Modified on 03/29/2001 (Entered: 06/16/2000) |
| 06/19/2000 | 17 | NOTICE by court of setting hearing on motion for summary judgment by Jacquelyn Stewart, Jennifer M. Granholm, John Engler [16-1] for 2:00 8/23/00 (copies mailed) (lh) (Entered: 06/20/2000) |
| 06/26/2000 | 18 | AMENDED NOTICE from the chambers of Judge Friedman setting hearing on motion for summary judgment by Jacquelyn Stewart, Jennifer M. Granholm, John Engler [16-1] for 2:00 11/1/00 with proof of mailing (dh) (Entered: 06/27/2000) |
| 07/07/2000 | 19 | MOTION by plaintiff for continuance of hearing set for 11/1/00 with proof of mailing (PP) (Entered: 07/10/2000) |
| 07/12/2000 | 20 | REPORT and recommendation by Magistrate Judge Marc L. Goldman that motion to intervene as defendant by MI Beer Wine Whlse [5-1] be granted, with proof of mailing [EOD Date: 7/18/00] (dh) (Entered: 07/18/2000) |

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|---|---|---|
| 07/13/2000 | 21 | ORDER by Judge Bernard A. Friedman granting motion for continuance of hearing set for 11/1/00 by plaintiffs [19-1] [EOD Date 7/18/00] (dh) (Entered: 07/18/2000) |
| 07/17/2000 | 22 | PROOF of mailing by plaintiffs of order granting plaintiffs' motion for continuance (dh) (Entered: 07/19/2000) |
| 08/15/2000 | 23 | PROOF of mailing of defendants' interrogatories, request for admissions, and request for production of documents to each of the thirteen separate (ls) (Entered: 08/16/2000) |
| 08/16/2000 | 24 | PROOF of mailing of defendants John Engler's and Jennifer M. Granholm's response to plaintiffs' interrogatories, response to plaintiffs' request for admissions and response to plaintiffs' request for production (ls) (Entered: 08/18/2000) |
| 08/17/2000 | 25 | MEMORANDUM opinion and order by Judge Bernard A. Friedman accepting and adopting report & recommendation [20-1] [EOD Date: 8/22/00] (ew) (Entered: 08/22/2000) |
| 08/17/2000 | 26 | JUDGMENT by Judge Bernard A. Friedman accepting and adopting report & recommendation [20-1] and, granting motion to intervene as defendant by MI Beer Wine Whlse [5-1] [EOD Date 8/22/00] (ew) (Entered: 08/22/2000) |
| 08/21/2000 | 27 | AGREEMENT regarding scheduling [EOD Date: 8/22/00] (ew) (Entered: 08/22/2000) |

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|---|---|---|
| 08/24/2000 | 28 | PROOF of mailing of defendant Jacquelyn Stewarts response to plaintiffs' interrogatories; response to plaintiffs' request for admissions; and response to plaintiffs' request for production (ew) (Entered: 08/24/2000) |
| 09/07/2000 | 29 | MOTION by plaintiffs for leave to amend complaint civil complaint [1-1] with brief, exhibit (proposed amended complaint) and proof of mailing (lh) Modified on 09/11/2000 (Entered: 09/11/2000) |
| 09/11/2000 | 30 | ORDER by Judge Bernard A. Friedman referring motion for leave to amend complaint civil complaint [1-1] by plaintiffs [29-1] to Magistrate Judge Marc L. Goldman for hearing and determination [EOD Date 9/12/00] (lh) (Entered: 09/12/2000) |
| 09/12/2000 | 31 | NOTICE by court of setting hearing on motion for leave to amend complaint civil complaint [1-1] by plaintiffs [29-1] for 1:30 10/2/00 (lh) (Entered: 09/13/2000) |
| 09/15/2000 | 32 | RESPONSE by defendant John Engler, defendant Jennifer M. Granholm, defendant Jacquelyn Stewart to motion for leave to amend complaint civil complaint [1-1] by plaintiffs [29-1], with exhibits and proof of service (RH) (Entered: 09/18/2000) |
| 09/20/2000 | 33 | RESPONSE by movant MI Beer Wine Whlse to motion for leave to amend complaint civil complaint [1-1] by plaintiffs [29-1], with exhibit and proof of service (RH) (Entered: 09/20/2000) |

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|---|---|---|
| 09/21/2000 | 34 | ANSWER by movant MI Beer Wine Whlse to complaint [1-1], with proof of service (RH) (Entered: 09/22/2000) |
| 09/21/2000 | 34 | AFFIRMATIVE defenses by movant MI Beer Wine Whlse (RH) (Entered: 09/22/2000) |
| 09/28/2000 | 35 | SUPPLEMENTAL brief by defendants in support of motion for summary judgment by Jacquelyn Stewart, Jennifer M. Granholm, John Engler [16-1] (ew) (Entered: 09/29/2000) |
| 09/29/2000 | 36 | MOTION by MI Beer Wine Whlse to dismiss with brief, exhibits and proof of mailing (lh) (Entered: 10/02/2000) |
| 10/02/2000 | | MOTION hearing held on motion for leave to amend complaint civil complaint [1-1] by plaintiffs [29-1] - disposition: GRANTED - Magistrate Judge Marc L. Goldman - tape #: 10/02/00 (gw) (Entered: 10/02/2000) |
| 10/02/2000 | 37 | MOTION by plaintiffs for summary judgment with brief, designation of evidence, attachments and proof of mailing (lh) (Entered: 10/03/2000) |
| 10/03/2000 | 38 | NOTICE by court setting hearing on motion for summary judgment by plaintiffs [37-1] for 2:00 1/31/01 (copies mailed) (lh) (Entered: 10/04/2000) |
| 10/03/2000 | 39 | NOTICE by court of setting hearing on motion to dismiss by MI Beer Wine Whlse [36-1] for 2:00 1/31/00 (copies mailed) (lh) (Entered: 10/04/2000) |

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|---|---|---|
| 10/04/2000 | 45 | ORDER by Magistrate Judge Marc L. Goldman granting motion for leave to amend complaint civil complaint [1-1] by plaintiffs [29-1], discovery request cutoff for 11/3/00, response to cross motion for summary judgment [37-1] [16-1] is extended until 11/3/00, supplemental motion for summary judgment is extended 12/18/00, response to any supplemental motion for summary judgment 1/5/01 and hearing on cross motions for summary judgment on 1/31/01 @ 2:00 [EOD Date 10/6/00] with proof of mailing (lh) (Entered: 10/06/2000) |
| 10/04/2000 | 46 | AMENDED civil complaint by plaintiff adding Malvadino Vineyards and Domaine Alfred Inc (lh) (Entered: 10/06/2000) |
| 10/05/2000 | 40 | MOTION by plaintiffs' to file overlong brief in opposition to defendant's motion for summary judgment with brief (lh) (Entered: 10/05/2000) |
| 10/05/2000 | 41 | ORDER by Judge Bernard A. Friedman granting motion to file overlong brief in opposition to defendant's motion for summary judgment by plaintiffs [40-1] [EOD Date 10/5/00] (lh) (Entered: 10/05/2000) |
| 10/05/2000 | 42 | RESPONSE and brief in opposition by plaintiffs' to motion for summary judgment by Jacquelyn Stewart, Jennifer M. Granholm, John Engler [16-1] with attachments (lh) Modified on 10/05/2000 (Entered: 10/05/2000) |

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|---|---|---|
| 10/05/2000 | 43 | APPENDIX by plaintiffs to plaintiffs response and brief in opposition [42-1] to motion for summary judgment by Jacquelyn Stewart, Jennifer M. Granholm, John Engler [16-1] (lh) (Entered: 10/05/2000) |
| 10/05/2000 | 44 | PROOF of mailing by plaintiffs of pleadings 40 thru 43 (lh) (Entered: 10/05/2000) |
| 10/10/2000 | 47 | RESPONSE by plaintiffs to supplement by Jacquelyn Stewart, Jennifer M. Granholm, John Engler [35-1] with proof of mailing (ew) (Entered: 10/11/2000) |
| 10/12/2000 | 48 | AMENDED complaint by plaintiffs', with proof of service (RH) (Entered: 10/13/2000) |
| 10/20/2000 | 49 | ANSWER by defendants John Engler, Jennifer M. Granholm, Jacquelyn Stewart to amended complaint by plaintiffs [48-1] with affirmative defenses, proof of mailing (dh) (Entered: 10/23/2000) |
| 10/20/2000 | 49 | AFFIRMATIVE defenses by defendants John Engler, Jennifer M. Granholm, Jacquelyn Stewart (dh) (Entered: 10/23/2000) |
| 10/20/2000 | 50 | ANSWER by movant MI Beer Wine Whlse to amended complaint by plaintiffs [48-1] with affirmative defenses, proof of mailing (dh) (Entered: 10/23/2000) |
| 10/20/2000 | 50 | AFFIRMATIVE defenses by movant MI Beer Wine Whlse (dh) (Entered: 10/23/2000) |

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|---|---|---|
| 10/26/2000 | 51 | RESPONSE by plaintiffs Eleanor Heald, Ray Heald, John Arundel, Karen Brown, Richard Brown, Bonnie McMinn, Gregory Stein, Morlan, William Horwath, Margaret Christina, Robert Christina, Trisha Hopkins, Jim Hopkins to motion to dismiss by MI Beer Wine Whlse [36-1] with brief, proof of mailing (dh) (Entered: 10/27/2000) |
| 10/30/2000 | 52 | PROOF of mailing by defendants' John Engler, Jennifer M. Granholm, Jacquelyn Stewart of interrogatories and request to produce documents to plaintiffs' Malvadino Vineyards, Inc., Domaine Alfred, Inc. (PP) (Entered: 10/31/2000) |
| 11/03/2000 | 53 | MOTION by defendant to strike affidavits with brief, attachments, notice of hearing, proof of mailing (dh) Modified on 11/03/2000 (Entered: 11/03/2000) |
| 11/03/2000 | 54 | RESPONSE by defendants to motion for summary judgment by plaintiffs [37-1] with brief, attachments, proof of mailing (dh) (Entered: 11/03/2000) |
| 11/03/2000 | 55 | REPLY by movant MI Beer Wine Whlse to response to motion to dismiss by MI Beer Wine Whlse [36-1] with proof of mailing (ew) (Entered: 11/06/2000) |
| 11/03/2000 | 56 | RESPONSE by movant MI Beer Wine Whlse to motion for summary judgment by plaintiffs [37-1] with attachments (ew) (Entered: 11/06/2000) |
| 11/03/2000 | 57 | PROOF of mailing of intervening defendant MI Beer and Wine Wholesalers Assoc's interrogatories and requests to produce to plaintiffs (ew) (Entered: 11/06/2000) |

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|---|---|---|
| 11/03/2000 | 58 | PROOF of mailing of defendant Jennifer M. Granholm's continuing response to plaintiffs' request for production and defendants Stewart's and Granholm's continuing responses to plaintiff's interrogatories (ew) (Entered: 11/06/2000) |
| 11/06/2000 | 59 | NOTICE setting hearing on motion to strike affidavits by Jacquelyn Stewart, Jennifer M. Granholm, John Engler [53-1] for 2:00 1/31/01 (ew) (Entered: 11/07/2000) |
| 11/13/2000 | 60 | PROOF of mailing of Intervenor-Defendant Michigan Beer and Wine Wholesalers Association's Concurrence in Defendants' motion to strike affidavits to counsel of record (lh) (Entered: 11/14/2000) |
| 11/14/2000 | 62 | MOTION by movants Cntrl MI Univ, En MI Univ, Ferris St Univ, Lake Superior St, MI St Univ, MI Tech Univ, Saginaw Valley St, Univ MI, Wayne St Univ for leave to file amicus brief, represented by Leonard M Niehoff with brief and proof of mailing (lh) (Entered: 11/20/2000) |
| 11/20/2000 | 61 | REPLY by plaintiff to response to motion for summary judgment by plaintiffs [37-1], with attachments and proof of service (RH) (Entered: 11/20/2000) |
| 11/20/2000 | 63 | RESPONSE by plaintiffs' to motion to strike affidavits by Jacquelyn Stewart, Jennifer M. Granholm, John Engler [53-1] (RH) (Entered: 11/21/2000) |
| 11/20/2000 | 64 | MOTION by plaintiffs' to strike exhibits , with brief (RH) (Entered: 11/21/2000) |
| 11/20/2000 | 65 | PROOF of mailing by plaintiffs' of pleadings 62-64 (RH) (Entered: 11/21/2000) |

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| 11/27/2000 | 66 | RESPONSE by defendants to motion for leave to file amicus brief, represented by Leonard M Niehoff by movants [62-1] with proof of mailing (ew) (Entered: 11/29/2000) |
| 11/30/2000 | 67 | RESPONSE by plaintiff to motion for leave to file amicus brief, represented by Leonard M Niehoff by movants [62-1] with proof of mailing (ew) (Entered: 12/01/2000) |
| 11/30/2000 | 68 | PROOF of mailing of stipulation approving MI Interfaith Counsel on Alcohol Problems' request for leave to file brief amicus curiae (ew) (Entered: 12/01/2000) |
| 12/01/2000 | 69 | RESPONSE by defendant John Engler, defendant Jennifer M. Granholm to motion to strike exhibits by plaintiffs [64-1], with proof of service (RH) (Entered: 12/04/2000) |
| 12/01/2000 | 70 | REPLY by defendant John Engler, defendant Jennifer M. Granholm to response to motion to strike affidavits by Jacquelyn Stewart, Jennifer M. Granholm, John Engler [53-1], with attachments and proof of service (RH) (Entered: 12/04/2000) |
| 12/04/2000 | 71 | REPLY by defendant John Engler, defendant Jennifer M. Granholm to response to motion to dismiss by MI Beer Wine Whlse [36-1], with proof of service (RH) (Entered: 12/04/2000) |
| 12/08/2000 | 72 | ORDER by Judge Bernard A. Friedman granting motion for leave to file amicus brief, represented by Leonard M by movants [62-1] [EOD Date 12/11/00] (RH) (Entered: 12/11/2000) |

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| 12/15/2000 | 73 | MOTION by movant MI Beer Wine Whlse to extend time to file supplemental motion regarding summary judgment with brief, and proof of mailing. (PP) (Entered: 12/18/2000) |
| 12/18/2000 | 74 | MOTION by defendants' John Engler, Jennifer M. Granholm, Jacquelyn Stewart for summary judgment against plaintiff Domaine Alfred, Inc with brief, attachment A, and proof of mailing. (PP) (Entered: 12/19/2000) |
| 12/20/2000 | 75 | STIPULATION by plaintiff, defendant, approving Michigan Interfaith Counsel on Alcohol problems request for leave to file brief as amicus curiae [EOD Date: 12/21/00] (PP) (Entered: 12/21/2000) |
| 12/20/2000 | 76 | MOTION by movant MI Interfaith Cnsl for leave to file amicus brief in support of motions for summary judgment filed by defendants and motion to dismiss filed by intervening defendant (PP) (Entered: 12/21/2000) |
| 12/20/2000 | 77 | ORDER by Judge Bernard A. Friedman granting motion for leave to file amicus brief in support of motions for summary judgment filed by defendants and motion to dismiss filed by intervening defendant by MI Interfaith Cnsl [76-1] [EOD Date 12/21/00] (PP) (Entered: 12/21/2000) |
| 12/20/2000 | 78 | AMICUS curiae brief by MI Interfaith Cnsl in support of motions for summary judgment filed by defendants and motion to dismiss filed by intervening defendant, with exhibit A. (PP) (Entered: 12/21/2000) |

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| 12/21/2000 | 79 | NOTICE by Judge Friedman's chambers of setting hearing on motion for summary judgment against plaintiff Domaine Alfred, Inc by Jacquelyn Stewart, Jennifer M. Granholm, John Engler [74-1] for 2:00 1/31/01 (PP) (Entered: 12/22/2000) |
| 12/22/2000 | 80 | ORDER by Judge Bernard A. Friedman with stipulation, extending time to file supplemental motions/briefs regarding summary judgment, setting deadline for filing motions for 12/27/00 [EOD Date: 12/27/00] (ew) (Entered: 12/27/2000) |
| 12/27/2000 | 81 | SUPPLEMENT by movant MI Beer Wine Whlse motion to dismiss by MI Beer Wine Whlse [36-1] with brief and proof of mailing (ew) Modified on 12/29/2000 (Entered: 12/28/2000) |
| 01/08/2001 | 82 | RESPONSE in opposition by plaintiffs to supplemental motion for summary judgment against plaintiff Domaine Alfred, Inc by John Engler, Jennifer M. Granholm, Jacquelyn Stewart [74-1] with brief (dh) (Entered: 01/09/2001) |
| 01/08/2001 | 83 | MOTION by plaintiffs to strike exhibit D in support of supplemental motion for summary judgment with brief (dh) (Entered: 01/09/2001) |
| 01/08/2001 | 84 | PROOF of mailing by plaintiffs of pleadings 82,83 (dh) (Entered: 01/09/2001) |
| 01/09/2001 | 85 | STIPULATION by all parties of voluntary dismissal regarding Malvadino Vineyards, Inc without prejudice [EOD Date: 1/10/01] (dh) (Entered: 01/10/2001) |

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| 01/11/2001 | 86 | SUPPLEMENT by plaintiffs to second motion to strike exhibit D in support of supplemental motion for summary judgment by plaintiffs [83-1] with consent of intervening defendant, attachment, proof of mailing (dh) (Entered: 01/12/2001) |
| 02/02/2001 | 87 | LETTER by counsel for John Engler, Jennifer M. Granholm, Jacquelyn Stewart rescheduling motion arguments on motion for summary judgment against plaintiff Domaine Alfred, Inc by John Engler, Jennifer M. Granholm, Jacquelyn Stewart [74-1] motion to strike affidavits by John Engler, Jennifer M. Granholm, Jacquelyn Stewart [53-1], motion for summary judgment by plaintiffs [37-1] and motion to dismiss by MI Beer Wine Whlse [36-1] for 2:00 3/14/01 (lh) (Entered: 02/06/2001) |
| 03/29/2001 | 88 | MOTION by plaintiff for continuance with proof of mailing (dh) (Entered: 03/30/2001) |
| 06/11/2001 | 89 | NOTICE by plaintiffs of additional legal authority in support of motion for summary judgment by plaintiffs [37-1] with proof of mailing (lh) (Entered: 06/12/2001) |
| 06/13/2001 | | MOTION hearing held on motion for summary judgment against plaintiff Domaine Alfred, Inc by John Engler, Jennifer M. Granholm, Jacquelyn Stewart [74-1], motion for summary judgment [37-1], motion to dismiss by MI Beer Wine Whlse [36-1] - disposition: taken under advisement - Judge Bernard A. Friedman - Court Reporter: Joan Morgan (cd) (Entered: 06/14/2001) |

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| 07/25/2001 | 90 | NOTICE by defendants of additional legal authority with attachments and proof of mailing (LS) (Entered: 07/26/2001) |
| 09/27/2001 | 92 | JUDGMENT entered by Judge Bernard A. Friedman for defendants and against plaintiffs [EOD Date: 9/28/01] (lh) (Entered: 09/28/2001) |
| 09/28/2001 | 91 | OPINION and order by Judge Bernard A. Friedman denying motion for summary judgment by plaintiffs and that plaintiffs' request for injunctive and declaratory relief are denied [37-1], denying defendants' motions to dismiss pr for summary judgment due to lack of standing or for lack of subject matter jurisdiction are denied and that defendants' motions for summary judgment on the merits are granted [74-1] [16-1] and that the remaining motions are denied as moot [88-1] [83-1] [73-1] [64-1] [53-1] [36-1] [EOD Date: 9/28/01] (lh) (Entered: 09/28/2001) |
| 10/15/2001 | 93 | MOTION by plaintiffs' for reconsideration of summary judgment after ruling on evidentiary motions with brief and proof of mailing (lh) Modified on 10/15/2001 (Entered: 10/15/2001) |
| 11/05/2001 | 94 | ORDER by Judge Bernard A. Friedman denying motion for reconsideration of summary judgment after ruling on evidentiary motions by plaintiffs [93-1] with proof of mailing [EOD Date 11/6/01] (dh) (Entered: 11/06/2001) |
| 12/04/2001 | 95 | APPEAL by plaintiff of orders [94-1] and [91-1] to USCA - FEE: PAID - Receipt #: 428817 (do) (Entered: 12/06/2001) |

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| 12/06/2001 | 96 | PROOF of mailing of notice of appeal to USCA, counsel and court reporter of record (do) (Entered: 12/06/2001) |
| 12/06/2001 | 97 | CERTIFIED copy of appeal notice by plaintiffs [95-1] and docket transmitted to USCA (do) (Entered: 12/06/2001) |
| 12/17/2001 | 98 | TRANSCRIPT order form by Domaine Alfred Inc, Malvadino Vineyards regarding appeal notice by plaintiffs [95-1] requesting transcript(s) of: no hearings (dh) (Entered: 12/18/2001) |
| 12/28/2001 | 99 | ACKNOWLEDGMENT from USCA of receipt of appeal notice by plaintiffs [95-1] - appeal case # 01-2720 (RH) (Entered: 01/02/2002) |
| 09/04/2003 | 100 | SLIP opinion from USCA reversing the judgment of district court and remanding the case for entry of judgment on favor of plaintiffs - appeal case # 01 2720 (lh) Modified on 09/26/2003 (Entered: 09/05/2003) |
| 09/04/2003 | 101 | NON-CERTIFIED copy of order from USCA reversing the judgment of district court and remanding the case for entry of judgment in favor of plaintiffs - appeal case # 01-2720 (lh) (Entered: 09/05/2003) |
| 09/08/2003 | 102 | JUDGMENT entered by Judge Bernard A. Friedman for plaintiffs and against defendants with proof of service [EOD Date: 9/9/03] (dh) (Entered: 09/09/2003) |
| 09/16/2003 | 103 | NOTICE by movant MI Beer Wine Whlse of for joinder in defendant's motion for relief from judgment and/or recommendation (not on docket) with attachments, and proof of service. (PP) (Entered: 09/17/2003) |

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| 09/17/2003 | 104 | MOTION by plaintiff to extend time to file affidavits in support of motion for attorney fees with attachment, and proof of service. (PP) (Entered: 09/18/2003) |
| 09/17/2003 | 105 | MOTION by plaintiffs' for attorney fees with brief, attorney affidavits', and proof of service. (PP) (Entered: 09/18/2003) |
| 09/18/2003 | 106 | MOTION by defendant relief from judgment, for reconsideration of order judgment [102-1] with brief, attachments, and proof of service. (PP) (Entered: 09/22/2003) |
| 09/25/2003 | 107 | ORDER by Judge Bernard A. Friedman granting motion relief from judgment by John Engler, Jennifer M. Granholm, Jacquelyn Stewart [106-1]; granting motion for reconsideration of order judgment [102-1] by John Engler, Jennifer M. Granholm, Jacquelyn Stewart [106-2] and vacating order judgment [102-1] [EOD Date 9/26/03] (RH) (Entered: 09/26/2003) |
| 10/06/2003 | 108 | JOINT RESPONSE by defendants and intervening defendant to motion for attorney fees by Domaine Alfred Inc [105-1] with proof of service (lh) (Entered: 10/08/2003) |
| 10/06/2003 | 108 | REQUEST by defendants and intervening defendants for additional time to response to said motion with proof of service (lh) (Entered: 10/08/2003) |
| 12/03/2003 | 109 | CERTIFIED copy of order from USCA staying the mandate for 90 days to allow time to file a petition for writ of certiorari case [0-0] - appeal case # 01-2720 (RH) (Entered: 12/04/2003) |

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| 02/25/2004 | 110 | LETTER from SC re [95] Notice of Appeal filed - petition for writ of certiorari placed on docket [Appeal Case Number 03-1120] (LBeh,) (Entered: 02/27/2004) |
| 02/25/2004 | 111 | LETTER from SC re [95] Notice of Appeal - petition for writ of certiorari placed on docket [Appeal Case Number 03-1116] (LBeh, ) (Entered: 02/27/2004) |
| 06/07/2004 | 112 | LETTER from SC re [95] Notice of Appeal - petition for writ of certiorari is granted - limited and consolidated with nos. 03-1120 and 03-1274. [Appeal Case Number 03-1116] (LBeh,) (Entered: 06/10/2004) |
| 06/28/2004 | 113 | ORDER denying without prejudice 104 Motion for additional time to submit affidavits in support of motion for attorney fees and 105 Motion for attorney fees. Signed by Honorable Bernard A Friedman. (DPer, ) (Entered: 06/29/2004) |

**GENERAL DOCKET**
**US COURT OF APPEALS FOR THE SIXTH CIRCUIT**

COURT OF APPEALS DOCKET #: 01-2720 FILED: 12/20/01

NSUIT: 3950 CONSTITUTIONAL - STATE STATUTE

HEALD; ET AL. V. ENGLER; ET AL.

APPEAL FROM: EASTERN DISTRICT OF MICHIGAN AT DETROIT

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| 12/20/01 | Civil Case Docketed. Notice filed by Appellant Eleanor Heald, Appellant Ray Heald, Appellant John Arundel, Appellant Karen Brown, Appellant Richard Brown, Appellant Bonnie McMinn, Appellant Gregory Stein, Appellant Michelle Morlan, Appellant William Horwath, Appellant Margaret Christina, Appellant Robert Christina, Appellant Trisha Hopkins, Appellant Jim Hopkins, Appellant Domaine Alfred Inc. Transcript needed: y (ert) |
| 1/2/02 | TRANSCRIPT ORDER FORM filed by James A. Tanford for Appellants. Transcript not needed. [01-2720] [2591509-1] (ert) |
| 1/2/02 | APPEARANCE filed by Attorney James A. Tanford for Appellants Eleanor Heald, et al [01-2720] (ert) |
| 1/2/02 | PRE-ARGUMENT STATEMENT filed by James A. Tanford for Appellant Domaine Alfred Inc, Appellant Jim Hopkins, Appellant Trisha Hopkins, Appellant Robert Christina, Appellant Margaret Christina, Appellant William Horwath, Appellant Michelle Morlan, Appellant Gregory Stein, Appellant Bonnie McMinn, Appellant Richard Brown, Appellant Karen Brown, Appellant John Arundel, Appellant Ray Heald, Appellant Eleanor Heald [01-2720] (ert) |

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| 1/2/02 | APPEARANCE filed by Attorney Irene M. Mead for Appellee Jacquelyn Stewart, Appellee Jennifer M. Granholm, Appellee John Engler [01-2720] (ert) |
| 1/2/02 | APPEARANCE filed by Attorney Anthony S. Kogut for Appellee MI Wine & Beer [01-2720] (ert) |
| 1/3/02 | BRIEFING LETTER SENT setting briefing schedule: appellant brief due 2/12/02; appellee brief due 3/14/02; appendix 4/4/02; final briefs due 4/25/02; . (ert) |
| 1/4/02 | Mediation Office is involved in this appeal. [01-2720] (ert) |
| 2/1/02 | Mediation Office is no longer involved in this appeal at this time. (ert) |
| 2/14/02 | PROOF BRIEF filed by James A. Tanford for Appellant Domaine Alfred Inc, Appellant Jim Hopkins, Appellant Trisha Hopkins, Appellant Robert Christina, Appellant Margaret Christina, Appellant William Horwath, Appellant Michelle Morlan, Appellant Gregory Stein, Appellant Bonnie McMinn, Appellant Richard Brown, Appellant Karen Brown, Appellant John Arundel, Appellant Ray Heald, Appellant Eleanor Heald. Certificate of service date 2/12/02 Number of Pages: 40. [01-2720] (ert) |
| 2/14/02 | Request to require oral argument filed by James A. Tanford for Appellant Domaine Alfred Inc, Appellant Jim Hopkins, Appellant Trisha Hopkins, Appellant Robert Christina, Appellant Margaret Christina, Appellant William Horwath, Appellant Michelle Morlan, Appellant Gregory Stein, Appellant Bonnie McMinn, Appellant Richard Brown, Appellant Karen Brown, Appellant John Arundel, Appellant Ray Heald, Appellant Eleanor Heald [01-2720] (ert) |

2/22/02 APPEARANCE filed by Attorney Clint Bolick for Amicus Curiae Juanita Swedenburg, Amicus Curiae Swedenburg Winery, Amicus Curiae David Lucas, Amicus Curiae Lucas Winery [01-2720] (lead) (ert)

2/22/02 APPEARANCE filed by Attorney Wiliam H. Mellor for Amicus Curiae Juanita Swedenburg, Amicus Curiae Swedenburg Winery, Amicus Curiae David Lucas, Amicus Curiae Lucas Winery [01-2720] (ert)

2/22/02 APPEARANCE filed by Attorney Steven M. Simpson for Amicus Curiae Juanita Swedenburg, Amicus Curiae Swedenburg Winery, Amicus Curiae David Lucas, Amicus Curiae Lucas Winery [01-2720] (ert)

2/22/02 BRIEF filed by Steven M. Simpson for Amicus Curiae Juanita Swedenburg, Amicus Curiae Swedenburg Winery, Amicus Curiae David Lucas, Amicus Curiae Lucas Winery, Wiliam H. Mellor for Amicus Curiae Juanita Swedenburg, Amicus Curiae Swedenburg Winery, Amicus Curiae David Lucas, Amicus Curiae Lucas Winery, Clint Bolick for Amicus Curiae Juanita Swedenburg, Amicus Curiae Swedenburg Winery, Amicus Curiae David Lucas, Amicus Curiae Lucas Winery. Copies 7. Certificate of service date 2/21/02. Number of Pages: 17. [01-2720] WITH CONSENT OF PARTIES in support of the appellants (ert)

3/14/02 PROOF BRIEF filed by Irene M. Mead for Appellee Jacquelyn Stewart, Appellee Jennifer M. Granholm, Appellee John Engler. Certificate of service date 3/11/02. Number of Pages: 48. [01-2720] (ert)

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| 3/14/02 | Request to require oral argument filed by Irene M. Mead for Appellee Jacquelyn Stewart, Appellee Jennifer M. Granholm, Appellee John Engler [01-2720] (ert) |
| 3/15/02 | PROOF BRIEF filed by Anthony S. Kogut for Appellee MI Wine & Beer. Certificate of service date 3/14/02 . Number of Pages: 49. [01-2720] (ert) |
| 3/15/02 | Request to require oral argument filed by Anthony S. Kogut for Appellee MI Wine & Beer [01-2720] (ert) |
| 3/22/02 | APPEARANCE filed by Attorney Louis R. Cohen for Amicus Curiae Wine & Spirits; et al [01-2720] (ert) |
| 3/22/02 | BRIEF filed by Louis R. Cohen for Amicus Curiae Wine & Spirits. Copies 7. Certificate of service date 3/20/02. [01-2720] (ert) |
| 3/29/02 | PROOF REPLY BRIEF filed by James A. Tanford for Appellant Domaine Alfred Inc, Appellant Jim Hopkins, Appellant Trisha Hopkins, Appellant Robert Christina, Appellant Margaret Christina, Appellant William Horwath, Appellant Michelle Morlan, Appellant Gregory Stein, Appellant Bonnie McMinn, Appellant Richard Brown, Appellant Karen Brown, Appellant John Arundel, Appellant Ray Heald, Appellant Eleanor Heald Certificate of service date 3/28/02 [01-2720] (ert) |
| 4/5/02 | Appellant MOTION filed to file substitute brief. Motion filed by James A. Tanford for Appellant Eleanor Heald, et al. Certificate of service date 4/4/02 [01-2720] (ert) |
| 4/5/02 | RULING granting motion to file substitute brief [2591558-1] filed by James A. Tanford [01-2720] (LG/jy/rfg;cm-4/5/02) . (ert) |
| 4/5/02 | Corrected appellant proof brief filed by James A. Tanford. Copies: 1. Certificate of Service date 4/4/02 [01-2720] Replaces brief filed 2/14/02 (ert) |

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| 4/5/02 | Request to require oral argument filed by James A. Tanford for Appellants [01-2720] (ert) |
| 4/8/02 | APPENDIX filed by James A. Tanford for Appellants. Copies: 6. Certificate of service date 4/4/02 [01-2720] (ert) |
| 4/9/02 | BRIEFING LETTER SENT requesting appendix corrections from James A. Tanford because complaint, etc.., resetting briefing schedule: corrected appx due 4/16/02; finals now due 5/30/02 [01-2720] . (ert) |
| 4/18/02 | Corrected appendix filed by James A. Tanford. Copies: 5. Certificate of Service date 4/16/02 [01-2720] (ert) |
| 4/18/02 | BRIEFING LETTER SENT resetting briefing schedule: final brief now due 4/30/02 [01-2720]. (ert) |
| 4/26/02 | Appellant MOTION filed to file substitute appendix. Motion filed by James A. Tanford for Appellants. Certificate of service date 4/25/02 [01-2720] (ert) |
| 4/26/02 | Corrected appendix filed by James A. Tanford. Copies: 5. 2 volumes. Certificate of Service date 4/25/02 [01-2720] (ert) |
| 4/29/02 | RULING granting motion to file substitute appendix [2591567-1] filed by James A. Tanford [01-2720] resetting briefing schedule: [01-2720] final briefs now due 5/13/02. (ert) |
| 5/6/02 | FINAL BRIEF filed by Irene M. Mead for Appellee Jacquelyn Stewart, Appellee Jennifer M. Granholm, Appellee John Engler. Copies: 7. Certificate of service date 5/2/02. Number of Pages: 48. [01-2720] (ert) |
| 5/6/02 | Request to require oral argument filed by Irene M. Mead for Appellee Jacquelyn Stewart, Appellee Jennifer M. Granholm, Appellee John Engler [01-2720] (ert) |

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| 5/13/02 | FINAL BRIEF filed by James A. Tanford for Appellants. Copies: 7. Certificate of service date 5/9/02 Number of Pages: 40. [01-2720] (ert) |
| 5/13/02 | Request to require oral argument filed by James A. Tanford for Appellants. [01-2720] (ert) |
| 5/13/02 | FINAL REPLY BRIEF filed by James A. Tanford for Appellants. Eleanor Heald, et al. Copies: 7 Certificate of service date 5/9/02 Number of Pages: 26. [01-2720] (ert) |
| 5/14/02 | FINAL BRIEF filed by Anthony S. Kogut for Appellee MI Wine & Beer. Copies: 7. Certificate of service date 5/13/02. Number of Pages: 49. [01-2720] (ert) |
| 5/14/02 | Request to require oral argument filed by Anthony S. Kogut for Appellee MI Wine & Beer [01-2720] (ert) |
| 7/22/02 | ADDITIONAL CITATION filed by James A. Tanford for Appellant Eleanor Heald, et al Certificate of service date 7/19/02 [01-2720] (ert) |
| 9/3/02 | Attorney LETTER filed regarding dates unavailable for oral argument (Oct. 9 thru Nov 1). Letter from James A. Tanford. Dated: 8/29/02 [01-2720] (dtk) |
| 1/8/03 | ADDITIONAL CITATION filed by James A. Tanford for the Appellants. Dated: 1/6/03 [01-2720] (dtk) |
| 2/2/03 | Attorney LETTER filed by the appellees John Engler, Jennifer Granholm, Jacquellyn Steward, and MI Wine & Beer notifying the court they filed a Petition for Writ of Cer 1/30/04. Letter from Donald S. McGehee. Certificate of service date [01-2720] (dtk) |
| 2/6/03 | Attorney LETTER filed regarding dates unavailable for oral argument (March 15-23 and July 21-Aug 2, 2003). Letter from James A. Tanford. Dated: 2/3/03 [01-2720] (dtk) |

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| 3/7/03 | APPEARANCE filed by Attorney Donald S. McGehee (Lead) for Appellees John Engler, Jennifer M. Granholm, Jacquelyn Stewart, and MI Wine & Beer [01-2720] (dtk) |
| 3/13/03 | Oral argument date set for May 7, 2003 in court room 403. Notice of argument sent to counsel. [01-2720] (rld) |
| 4/14/03 | ADDITIONAL CITATION filed by Donald S. McGehee for the Appellees. Dated: 4/11/03 [01-2720] (dtk) |
| 4/25/03 | ADDITIONAL CITATION filed by James A. Tanford for the appellants. Dated: 4/22/03 [01-2720] (dtk) |
| 5/7/03 | CAUSE ARGUED on 5/7/03 by James A. Tanford for Appellant Eleanor Heald, Appellant Ray Heald, Appellant John Arundel, Appellant Karen Brown, Appellant Richard Brown, Appellant Bonnie McMinn, Appellant Gregory Stein, Appellant Michelle Morlan, Appellant William Horwath, Appellant Margaret Christina, Appellant Robert Christina, Appellant Trisha Hopkins, Appellant Jim Hopkins, Appellant Domaine Alfred Inc, Donald S. McGehee for Appellee John Engler, Appellee Jennifer M. Granholm, Appellee Jacquelyn Stewart, Appellee MI Wine & Beer, Anthony S. Kogut for Appellee MI Wine & Beer before Judges Guy, Boggs, Daughtrey. [01-2720] (me) |
| 6/30/03 | ADDITIONAL CITATION filed by James A. Tanford for Appellant Eleanor Heald, et al. Certificate of service date 6/27/03 [01-2720] (blc) |
| 7/9/03 | ADDITIONAL CITATION filed by James A. Tanford for the Appellants. Dated: 7/8/03 [01-2720] (dtk) |

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| 8/28/03 | OPINION filed: The judgment of the district court granting summary judgment to the defendants is REVERSED, and the case is REMANDED for the entry of judgment in favor of the plaintiffs. Decision for publication pursuant to local rule 206 [01-2720]. Ralph B. Guy and Danny J. Boggs, Circuit Judges, Martha C. Daughtrey, Authoring Judge. (dtk) |
| 8/28/03 | JUDGMENT: REVERSED and REMANDED. (dtk) |
| 9/10/03 | PETITION for en banc rehearing filed by Anthony S. Kogut for Appellee MI Wine & Beer. Certificate of service date 9/9/03. [01-2720] (blh) |
| 9/11/03 | ADDITIONAL PETITION for en banc rehearing filed by Donald S. McGehee for Appellees John Engler, Jennifer M. Granholm, Jacquelyn Stewart, MI Wine & Beer. Certificate of service date 9/10/03. [01-2720] (blh) |
| 11/4/03 | ORDER filed denying petition for en banc rehearing [2813334-1] filed by Donald S. McGehee [01-2720], and petition for en banc rehearing [2812774-1] filed by Anthony S. Kogut [01-2720]. Danny J. Boggs, Ralph B. Guy, Martha C. Daughtrey, Circuit Judges. (blh) |
| 11/10/03 | Appellee MOTION filed to stay mandate pending a petition for writ of certiorari. Motion filed by Anthony S. Kogut for Appellee MI Wine & Beer. Certificate service date 11/7/03 . [01-2720] (dtk) |
| 11/10/03 | Appellee MOTION filed to stay mandate pending petition for writ of certiorari. Motion filed by Donald S. McGehee for Appellees John Engler, Jennifer M. Granholm, Jacquelyn Stewart, and MI Wine & Beer. Certificate of service date 11/7/03. [01-2720] (dtk) |

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| 11/21/03 | ORDER filed granting motion to stay mandate for 90 days [2849500-1] [2849521-1] filed by Anthony S. Kogut and Donald S. McGehee [01-2720] Entered by order of the court. (dtk) |
| 2/2/04 | Attorney LETTER filed by appellee Michigan Beer and Wine Wholesaler Assn notifying the court that a Petition for Writ of Certiorari was filed 2/2/04. Letter from Anthony S. Kogut. Certificate of service date 2/2/04 [01-2720] (dtk) |
| 2/5/04 | Attorney LETTER filed notifying the court that a Petition for Writ of Cert has been filed. Letter from Donald McGehee for the appellees John Engler, MI Wine and Beer, Jennifer Granholm and Jacquelyn Stewart. [01-2720]. Certificate of service date 2/2/04 [01-2720] (dtk) |
| 2/9/04 | U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellee Jennifer M. Granholm, et al. . Filed in the Supreme Court on 01-30-04, Supreme Ct. case number: 03-1116. [01-2720] (Petition #1) (swh) |
| 2/9/04 | U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Amicus Curiae Wine & Spirits. Filed in the Supreme Court on 02-02-04, Supreme Ct. case number: 03-1120. [01-2720] (petition #2) (swh) |
| 5/28/04 | U.S. Supreme Court letter filed: limited granting petition for writ of certiorari [2898939-1] filed by Jennifer M. Granholm as to one question, [01-2720] Supreme Court Nos. 03-1116 and 03-1120., . Filed in the Supreme Court on 05-24-04. (swh) |

(Order List: 541 U.S.)

**MONDAY, MAY 24, 2004**

* * * *

**CERTIORARI GRANTED**

* * * *

03-1116) GRANHOLM, GOV. OF MI, ET AL. V. HEALD, ELEANOR, ET AL.

03-1120) MI BEER & WINE WHOLESALERS V. HEALD, ELEANOR, ET AL.

03-1274) SWEDENBURG, JUANITA, ET AL. V. KELLY, EDWARD D., ET AL.

The petitions for writs of certiorari are granted limited to the following Question: "Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of Sec. 2 of the 21st Amendment?" These cases are consolidated and a total of one hour is allotted for oral argument.

* * * *

Supreme Court, U.S.
FILED
JUL 29 2004
OFFICE OF THE CLERK

(10)

No. 03-1120

IN THE

# Supreme Court of the United States

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,
*Petitioner,*

*v.*

ELEANOR HEALD, *et al.*,
*Respondents.*

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

## BRIEF FOR PETITIONER

*Of Counsel:*
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## QUESTION PRESENTED

By Order filed May 24, 2004, this Court granted certiorari in respect of the following question:

> Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of Sec. 2 of the 21st Amendment?

## PARTIES TO THE PROCEEDING

Petitioner, intervening defendant-appellee below, is the Michigan Beer & Wine Wholesalers Association ("MB&WWA"), a trade association of Michigan beer and wine wholesalers that intervened as a defendant in the district court.

Respondents, plaintiffs-appellants below, include Eleanor Heald, Ray Heald, John Arundel, Karen Brown, Richard Brown, Bonnie McMinn, Gregory Stein, Michelle Morlan, William Horwath, Margaret Christina, Robert Christina, Trisha Hopkins, Jim Hopkins, and Domaine Alfred, Inc. (hereafter collectively referred to as "plaintiffs"). The thirteen individual parties are Michigan residents who describe themselves as consumers of "fine and rare wines" or wine journalists. Respondent Domaine Alfred, Inc. is a California winery.

The Governor, the Attorney General, and the Chair of the Liquor Control Commission of the State of Michigan (hereafter collectively referred to as "Michigan" or the "State") were defendants-appellees below and are petitioners in No. 03-1116.

## RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner MB&WWA has no parent corporation, and there is no publicly held company that owns 10 percent or more of its stock.

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IN THE

# Supreme Court of the United States

No. 03-1120

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,
*Petitioner,*

*v.*

ELEANOR HEALD, *et al.*,
*Respondents.*

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

## BRIEF FOR PETITIONER

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 342 F.3d 517. The order denying rehearing en banc (Pet. App. 21a-22a) is not reported. The opinion of the district court granting summary judgment for the defendants (Pet. App. 25a-35a) is not reported. The order of the district court denying reconsideration (Pet. App. 39a-40a) is not reported.

### JURISDICTION

The judgment of the court of appeals was entered on August 28, 2003 (Pet. App. 19a-20a), and rehearing en banc was denied on November 4, 2003 (Pet. App. 21a-22a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

This case involves the Twenty-first Amendment, U.S. Const. amend. XXI (Pet. App. 45a); the Commerce Clause, U.S. Const. art. I, § 8, cl. 3 (Pet. App. 45a); the Webb-Kenyon Act, 27 U.S.C. § 122 (Pet. App. 46a); Mich. Comp. Laws §§ 436.1111, 436.1113, 436.1203, 436.1537, 436.1701, 436.1801, 436.1903, and 436.1909 (Pet. App. 47a-66a); and Mich. Admin. Code r. 436.1515, 436.1705, and 436.1719 (Pet. App. 67a-69a).

## STATEMENT

The Sixth Circuit authorized the plaintiffs to do precisely what the Twenty-first Amendment and the Webb-Kenyon Act, 27 U.S.C. § 122, expressly forbid: import alcoholic beverages into Michigan, for use within the State, without a license, in violation of state laws. The decision is inconsistent with the constitutional and statutory texts and with this Court's decisions repeatedly interpreting the Amendment to give the States "virtually complete control" over the physical importation of beverage alcohol. *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). State laws limiting importation are essential foundations for state laws regulating alcohol sales to residents and imposing excise taxes, which otherwise would be circumvented by direct shipments from out of state. Michigan's decision to allow direct shipping by licensed in-state entities, including wineries—which Michigan can effectively license, supervise, inspect, punish, and put out of business if they violate its laws—is an entirely rational statutory classification and does not make Michigan's ban on imports by unlicensed consumers any less constitutional.

The Commerce Clause establishes a national market for every product but one: the Twenty-first Amendment gives the States primary responsibility for regulating physical traffic in beverage alcohol destined for use by their citizens. As Justice Jackson said, the American people in 1933 "knew that liquor is a lawlessness unto itself" and therefore "did

not leave it to the courts to devise special distortions of the general rules as to interstate commerce to curb liquor's 'tendency to get out of legal bounds.'" *Duckworth* v. *Arkansas*, 314 U.S. 390, 398-399 (1941) (Jackson, J., concurring in result). Instead, the Twenty-first Amendment and Webb-Kenyon carve an exception to the dormant Commerce Clause, giving States approximately the same power over interstate physical traffic in alcohol (subject to the same limitations in other provisions of the Constitution) as Congress has to regulate physical traffic in any other product.

This case is not about "fine and rare wines." Under the Twenty-first Amendment, the States have provided the great bulk of the whole body of laws regulating the distribution of beverage alcohol in this country, and that system is challenged in this case. Plaintiffs sought a declaration and injunction striking down the Michigan statutory provision barring unlicensed Michigan residents from importing alcoholic beverages of all kinds, and the Sixth Circuit ordered that plaintiffs be given "judgment." But even if the complaint and the ruling below were more fine-tuned, this case would challenge the entire three-tier system, in force in most States since Prohibition, under which only licensed firms with a substantial in-state presence may sell beverage alcohol at wholesale or retail. If plaintiffs have a constitutional right to import "fine and rare wines," there is no obvious reason why they should not have a right to import cheap wines, or any other beverage that competes with local wineries for their beverage-alcohol dollars. And if Michigan cannot take into account a firm's substantial in-state physical presence in determining what regulatory burdens to impose, it is not clear why Michigan is not required to allow out-of-state firms to sell any beverage, at wholesale or retail, to its residents.

### A. Federal Law Governing State Control Over Alcohol Importation

Both the Constitution and a federal statute bar, in very broad terms, any importation of beverage alcohol in violation of state law, including importation by a resident not licensed

to do so. In 1913, Congress exercised its power under the Commerce Clause to enact the Webb-Kenyon Act, which forbids the "shipment or transportation . . . of any . . . intoxicating liquor of any kind from one State . . . into any other State . . . which said . . . liquor is intended . . . to be received, possessed, sold, or in any manner used . . . in violation of any law of such State." Act of Mar. 1, 1913, ch. 90, 37 Stat. 699 (codified at 27 U.S.C. § 122). In 1933, at the end of Prohibition, Section 2 of the Twenty-first Amendment made this federal protection of state power permanent by placing it into the Constitution. Section 2 prohibits "[t]he transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof." U.S. Const. amend. XXI, § 2. In 1935, to vanquish any doubt, Congress re-enacted Webb-Kenyon. Act of Aug. 27, 1935, ch. 740, § 202(b), 49 Stat. 877.

This Court has repeatedly affirmed that the Amendment gives States very broad power over the physical importation of beverage alcohol. Prior to Webb-Kenyon and the Twenty-first Amendment, the Court had struck down, on Commerce Clause grounds, a Texas statute insofar as it taxed sellers of out-of-state, but not in-state, beer and wine, *Tiernan* v. *Rinker*, 102 U.S. 123 (1880), and a South Carolina statute authorizing licensed in-state sales but barring direct interstate shipments to consumers, *Scott* v. *Donald*, 165 U.S. 58 (1897). But shortly after the Twenty-first Amendment was adopted, the Court ruled unanimously that a State need not treat in-state and out-of-state suppliers identically or equally. It held that California could impose a license fee on the right to import beer, adding that a State could "permit[] . . . manufacture [within the State] and sale" without any obligation to "let imported liquors compete with the domestic on equal terms." *State Bd. of Equalization* v. *Young's Market Co.*, 299 U.S. 59, 62 (1936). The Court reiterated in 1964 that States' power over physical importation of beverage alcohol for use by their citizens is virtually plenary. *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330 (1964) ("[A] State is totally unconfined by traditional Commerce Clause limitations when it restricts the im-

portation of intoxicants destined for use, distribution, or consumption within its borders.... This view of the scope of the Twenty-first Amendment ... has remained unquestioned."). More recently, the Court has reiterated that a state regulatory system that requires out-of-state manufacturers to sell only to licensed wholesalers "fall[s] within the core of the State's power under the Twenty-first Amendment" and is "unquestionably legitimate." *North Dakota* v. *United States*, 495 U.S. 423, 432 (1990) (plurality opinion of Stevens, J.); *see also id.* at 448 (Scalia, J., concurring in judgment) ("The Twenty-first Amendment ... empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler."). "No decision of the Supreme Court holds or implies that laws limited to the importation of liquor are problematic under the dormant commerce clause." *Bridenbaugh* v. *Freeman-Wilson*, 227 F.3d 848, 853 (7th Cir. 2000) (Easterbrook, J.).

**B. Michigan's Regulatory Scheme**

After the adoption of the Twenty-first Amendment in 1933, Michigan, like most other States, legalized the sale of beverage alcohol under strict controls. The Michigan Constitution was amended to permit the creation of a commission that would "exercise complete control of the alcoholic beverage traffic within this state." Mich. Const. art. 4, § 40; *see also Terre Haute Brewing Co.* v. *Liquor Control Comm'n*, 288 N.W. 339, 341 (Mich. 1939). The Michigan legislature then created the Liquor Control Commission and established a state distribution law whose core provision, § 203 of Michigan's Liquor Control Code, states that only the Commission itself, or a licensed or otherwise Commission-authorized person, may import beverage alcohol. Section 203, which is the provision the Sixth Circuit invalidated in this case, provides that "a sale, delivery, or importation of alcoholic liquor ... shall not be made in this state unless the sale, delivery, or importation is made by the commission, the commission's authorized agent or distributor, an authorized distribution agent approved by order of the commission, a

person licensed by the commission, or by prior written order of the commission." Mich. Comp. Laws § 436.1203(1); *see also id.* §§ 436.1201(2), 436.1901.

Like most other States, Michigan adopted a license system involving three tiers, manufacturers, wholesalers, and retailers. The Federal Alcohol Administration Act, 27 U.S.C. §§ 201-219a ("FAAA"), enacted in 1935, fosters such three-tier systems by requiring separate federal licenses for manufacturers and wholesalers, *id.* § 203(b), (c), and limiting the financial ties and commercial arrangements that these permitholders may have with retailers, *id.* § 205. Such three-tier systems have been widespread in the United States since the end of Prohibition.

Under Michigan's three-tier system, manufacturers (whether in-state or out-of-state) generally are licensed to sell only to licensed in-state wholesalers. *See* Mich. Comp. Laws §§ 436.1109(1), 436.1305, 436.1403, 436.1607(1); Mich. Admin. Code r. 436.1705, 436.1719. Licensed wholesalers may sell only to licensed retailers. *See* Mich. Comp. Laws §§ 436.1113(7), 436.1607(1). And licensed retailers may sell alcohol directly to consumers, including by direct shipment, subject to strict limitations described below and supervision by the Commission. *See* Mich. Comp. Laws §§ 436.1111(5), 436.1203(2)-(4); Mich. Admin. Code r. 436.1515. In 1985, Michigan adopted the modification of this scheme that led the Sixth Circuit to invalidate the entire scheme in this case. It amended its statutory definition of "wine maker" to permit in-state wine manufacturers to sell their own wine at retail. *See* Mich. Comp. Laws § 436.1113(9); *see also id.* § 436.1537(2), (3).

Michigan permits beverage alcohol to be sold in Michigan regardless of the place of manufacture, but Michigan insists that every drop sold (whether manufactured within the state or elsewhere) pass through a Michigan licensee that has a substantial in-state presence. It does so because such licensees are subject to initial approval, inspection, attachment of their assets, and punishment for violation of state laws, by measures up to and including loss of the state

licenses on which their business depends. Michigan licensees must comply with financial responsibility requirements and are subject to a police background check prior to licensing. *See, e.g.*, Mich. Admin. Code r. 436.1105(1)(b), (2)(g), 436.1113, 436.1115. Once licensed, they must comply with statutory requirements and Commission rules designed to achieve various important state objectives with respect to the distribution of alcohol. *See, e.g.*, Mich. Comp. Laws § 436.1203; Mich. Admin. Code r. 436.1401-.1529, 436.1601-.1651, 436.1702-.1735. To assure compliance, licensees are subject to investigations, inspections of both premises and sales records, and searches. *See* Mich. Comp. Laws §§ 436.1217, 436.1235; Mich. Admin. Code r. 436.1651, 436.1728, 436.1735. Violations subject a licensee to financial penalties, criminal punishment, and suspension or revocation of its liquor license. *See* Mich. Comp. Laws §§ 436.1903, 436.1907, 436.1909, 436.1911, 436.1917.

Michigan requires all beverage alcohol to pass through the hands of in-state licensees for three sets of reasons. First, this enables Michigan to regulate the use of alcohol. Michigan, for example, prohibits underage drinking. *See* Mich. Comp. Laws §§ 436.1701, 436.1703, 436.1801(2). Michigan gives communities the local option to bar the retail sale of alcohol in whole or in part, which numerous communities still do today. *See* Mich. Const. art. 4, § 40; Mich. Comp. Laws §§ 436.2101-.2113. Michigan imposes labeling and content restrictions on alcohol. *See, e.g.*, Mich. Comp. Laws §§ 436.1113(8), 436.2005; Mich. Admin. Code r. 436.1611, 436.1719. Licensees are responsible for knowing the age and sobriety of their customers and enforcing and observing these rules. *See, e.g.*, Mich. Comp. Laws §§ 436.1203, 436.1701, 436.1801(2), 436.1903.

Second, Michigan's regulatory scheme enables it to collect tax revenues from the sale of beverage alcohol. These taxes promote temperance (by raising the price of alcohol), and they provide a significant source of revenue for the State. Michigan imposes a 13.5¢ or 20¢ per liter excise tax on wine, depending on its strength. *See* Mich. Comp. Laws

§ 436.1301. In 2003, Michigan collected $168.3 million from specific taxes on liquor, license fees, fines and penalties, and beer and wine excise taxes. *See* Mich. Liquor Control Comm'n, *Annual Financial Report 2003*, at 2, *available at* http://www.michigan.gov/documents/annual_report_2003_final_86520_7.pdf (last visited July 29, 2004).

Finally, Michigan's scheme prevents the vertical integration of manufacturing, wholesaling, and retailing (sometimes referred to as "tied house" arrangements). *See* Mich. Comp. Laws §§ 436.1305, 436.1403, 436.1603, 436.1607, 436.1609. The three-tiered system is used by many States to prevent such integration, which has been associated with abusive sales practices and excessive consumption. *See generally Borman's, Inc.* v. *Michigan Liquor Control Comm'n*, 195 N.W.2d 316, 319-320 (Mich. Ct. App. 1972).

### C. Proceedings Below

In March 2000, the plaintiffs—individual Michigan residents who describe themselves as "collectors of fine and rare wines" (Am. Compl. ¶ 10)—filed suit against Michigan state officials in the United States District Court for the Eastern District of Michigan. They sought a judgment declaring § 203 of the Liquor Control Code (the provision that bars unlicensed importation of all beverage alcohol into the State) "unconstitutional in violation of the Commerce Clause of the United States Constitution." Am. Compl. at 10. Plaintiffs alleged that they "want to and intend to purchase bottled wines from suppliers outside the State of Michigan and have those wines shipped directly to their residences in Michigan." Am. Compl. ¶ 19. Although stating that their personal interest was in "fine and rare wines" (Am. Compl. ¶ 10), plaintiffs sought a sweeping injunction to prevent enforcement of any statutory provision "prohibiting or punishing the delivery of *alcoholic beverages* from an out-of-state supplier to an adult Michigan resident." Am. Compl. at 10 (emphasis added).

Two non-Michigan wineries (one of which was later dismissed from the case) were later added as plaintiffs. Pe-

titioner MB&WWA, a trade association of licensed Michigan beer and wine wholesalers, intervened as a defendant.

On cross-motions for summary judgment, the district court rejected plaintiffs' challenge and granted summary judgment for Michigan and MB&WWA. Citing this Court's decision in *North Dakota*, the district court held that a State has "virtually complete control" over the importation of beverage alcohol, including wines, under the Twenty-first Amendment. Pet. App. 33a (quoting *North Dakota*, 495 U.S. at 431). State control is not total, the district court stated, because a state regulation "must further 'core' concerns of [the Twenty-first] Amendment—namely, 'the interest of promoting temperance, ensuring orderly market conditions, and raising revenues.'" Pet. App. 34a (quoting *North Dakota*, 495 U.S. at 432). But, the court held, Michigan's direct shipment law is "one provision of a comprehensive system that regulates the flow of all alcohol beverages into and within the State of Michigan" (Pet. App. 34a), and Michigan's requirement that all wine flow through in-state licensees furthers the concerns of the Twenty-first Amendment because it "ensure[s] the collection of taxes from out-of-state wine manufacturers and . . . reduce[s] the risk of alcohol falling into the hands of minors" (Pet. App. 34a-35a). The district court distinguished *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984), in which this Court struck down Hawaii's tax exemption for a certain pineapple beverage as "mere economic protectionism," *id.* at 276, on the ground that the Hawaii provision, which did not purport to regulate imports, had no asserted purpose related to the Twenty-first Amendment. *See* Pet. App. 34a.

On appeal, the Sixth Circuit reversed and remanded with instructions to grant "judgment" for the plaintiffs. Pet. App. 17a. The court ruled that the provision allowing licensed in-state wineries to ship their own wine directly to consumers rendered Michigan's entire regulatory scheme "facially discriminatory" (Pet. App. 14a) and subject to "strict scrutiny" under the dormant Commerce Clause (Pet. App. 17a). The court held that Michigan's scheme failed

strict scrutiny because the "discrimination between in-state and out-of-state wineries" did not "further[] any of the [Twenty-first Amendment's] concerns" and, further, Michigan had not shown "that no reasonable non-discriminatory means exists to satisfy these concerns." Pet. App. 14a. The court did not respond to the argument of MB&WWA and Michigan that the Commerce Clause is not "dormant" here because Congress has used its Commerce Clause power to enact the Webb-Kenyon Act and thereby give the States federal statutory authority, in addition to their constitutional authority, to restrict imports of alcoholic beverages.

The Sixth Circuit disagreed explicitly with the Seventh Circuit's ruling in *Bridenbaugh* v. *Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000) (Easterbrook, J.), which upheld an indistinguishable Indiana statutory scheme against the same challenge. Whereas *Bridenbaugh* viewed these cases as "pit[ting] the twenty-first amendment, which appears in the Constitution, against the 'dormant commerce clause,' which does not," *id.* at 849, the Sixth Circuit ruled that the "traditional dormant Commerce Clause analysis" governed, and that Michigan had to meet a "strict scrutiny" test and justify as "needed" and "least restrictive" its decision to bar its residents from receiving direct shipments from out-of-state firms while allowing them to receive direct shipments from licensed in-state wineries. Pet. App. 12a, 17a. The Sixth Circuit gave the Twenty-first Amendment no significance except to *limit* the state governmental interests that an importation regulation might permissibly serve. It otherwise applied the same Commerce Clause analysis that it would apply to importation of any other product.

The Sixth Circuit rejected a long series of decisions of this Court (dating from *Young's Market* in 1936 through *North Dakota* in 1990) holding that States have near plenary power under the Twenty-first Amendment to regulate the physical importation of alcohol. The Sixth Circuit considered this line of decisions as tacitly jettisoned by this Court's decisions in *Hostetter*—which dealt with alcoholic beverages traveling through (but not destined for use in) New York—

and *Bacchus*—which dealt not with an importation regulation but with a discriminatory tax scheme that the State (Hawaii) made no serious effort to defend under the Twenty-first Amendment.

By ordering "judgment" for the plaintiffs, the court appeared to strike down the State's entire scheme of limiting imports of beverage alcohol (as plaintiffs had requested). The remedy was not limited either to "fine and rare wines" or to the offending treatment of licensed in-state wineries. MB&WWA and Michigan both filed petitions for rehearing en banc, seeking modification of both the constitutional ruling and the remedial ruling. The Sixth Circuit rejected those petitions without comment.

MB&WWA timely filed a petition for writ of certiorari on February 2, 2004. On May 24, 2004, this Court granted and consolidated MB&WWA's petition (No. 03-1120), Michigan's petition for certiorari (No. 03-1116), and a petition (No. 03-1274) to review the Second Circuit's decision in *Swedenburg* v. *Kelly*, 358 F.3d 223 (2d Cir. 2004). The petitions were granted limited to the single Question Presented.

## INTRODUCTION AND SUMMARY OF ARGUMENT

This case is not about "fine and rare wines." The Sixth Circuit struck down the Michigan statute, § 203, that bars unlicensed Michigan residents from importing all alcoholic beverages and thus provides a necessary foundation for all Michigan regulation of alcohol. The thousands of cheap wines available today from around the Nation, with greater appeal to most teenagers and alcohol abusers, are constitutionally indistinguishable from rare vintages. Moreover, if the decision below stands, there is no obvious reason why it does not extend to other out-of-state alcoholic beverages that compete with wine for the consumer's dollars, or to the fundamental requirement that wholesalers and retailers must be located in the State if they wish to sell to Michigan purchasers.

The Twenty-first Amendment gives the States broad power to adopt any reasonable (and otherwise constitu-

tional) regulation of the physical importation of alcoholic beverages for use by their residents, notwithstanding the dormant Commerce Clause. It gives the States essentially the same power over such physical traffic as the Commerce Clause gives Congress with respect to physical traffic in all other products: regulations must have some conceivable rational relationship to a proper purpose, and they may not violate other provisions of the Constitution such as the First Amendment, but the dormant Commerce Clause does not limit state regulation of physical imports.

The text and history of the Amendment make clear that its purpose was to carve an exception to the dormant Commerce Clause for physical importation of alcohol so that States could effectively regulate domestic use. Congress exercised *its* power under the Commerce Clause by enacting and re-enacting the Webb-Kenyon Act, confirming this state power. This Court then held unanimously, at a time when Prohibition and Repeal were recent memories, that the Twenty-first Amendment created a broad and unqualified exception to the dormant Commerce Clause for physical importation of alcohol for domestic use. In particular, the Court confronted and expressly rejected the contention that a State must treat out-of-state sellers of this one product identically or equally with in-state sellers:

> The plaintiffs . . . request us to construe the Amendment as saying, in effect: The State may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with domestic on equal terms. To say that would involve not a construction of the Amendment, but a rewriting of it.

*State Bd. of Equalization* v. *Young's Market Co.*, 299 U.S. 59, 62 (1936).

The Sixth Circuit expressly rejected this case, and even chided petitioners for citing it, but the Court has never since questioned the statement just quoted. On the contrary, although the Court has limited state power in cases involving

alcohol *not* intended for domestic use, or involving other provisions of the Constitution such as the First and Fourteenth Amendments, the Court has often reiterated that States have "virtually complete control" over physical traffic in alcohol destined for their citizens.

*Bacchus Imports Ltd.* v. *Dias*, 468 U.S. 263 (1984), which struck down a Hawaii taxing scheme that exempted a locally produced pineapple beverage, distinguished *Young's Market* on the ground that the tax exemption, whose only purpose (the State conceded in oral argument) was promotional, did not serve *any* purpose related to the Twenty-first Amendment. *See id.* at 274-276. Whether or not that distinction was successful, it was the premise of the decision, and *Bacchus* is not relevant here. It did not involve direct state regulation of "transportation or importation," and it did not involve any attempt by a State to promote any Twenty-first Amendment interest. We suggest that the best reading of *Bacchus* is that the tax exemption was unconstitutional because it did not involve the regulation of the physical importation of beverage alcohol and was admittedly "mere economic protectionism," *id.* at 276, that did not rationally serve any Twenty-first Amendment purpose.

The Michigan statute easily meets any test of rationality. In order to regulate sales of alcohol to its residents and, for example, prevent sales to minors and irresponsible consumers, Michigan requires that all beverage alcohol pass through licensed sellers with a substantial in-state physical presence. These are firms that Michigan can and does examine extensively before licenses are issued; that Michigan can inspect (both their premises and their records) after licensing; whose property Michigan can attach; and which Michigan can penalize for violations, not only with fines and other criminal penalties but by revoking licenses. Michigan's forty licensed in-state wineries are subject to these controls, in particular the threat of being put out of business if they, for example, fail to take elaborate care not to sell to underage persons. It was entirely rational for Michigan to decide that it does not need to require these wineries to sell through a

separate licensee, while insisting that the more than 2,000 wineries in the rest of the Nation, which Michigan cannot as a practical matter license or inspect and cannot put out of business, must sell to Michigan residents only through Michigan licensees.

## ARGUMENT

### I. THE TWENTY-FIRST AMENDMENT AND THE WEBB-KENYON ACT AUTHORIZE THE STATES TO ADOPT ANY RATIONAL REGULATION OF THE PHYSICAL IMPORTATION OF BEVERAGE ALCOHOL, WITHOUT REGARD TO THE RESTRICTIONS THAT THE DORMANT COMMERCE CLAUSE WOULD IMPOSE WITH RESPECT TO OTHER PRODUCTS.

The Twenty-first Amendment and the Webb-Kenyon Act create a single-product exception to the dormant Commerce Clause, giving the States the power to regulate the physical importation of alcohol. With respect to interstate shipments of this one product into their territory for use by their residents, States have a power similar to the power of Congress over interstate shipment of all other products. Like Congress, they may not exercise that power in a way that has no rational connection with their regulatory objectives, and they may not violate other provisions of the Constitution, but within these limits their power is virtually plenary. The text and legislative history of the Amendment and Webb-Kenyon are in accord on this point, and no decision of this Court has suggested that the dormant Commerce Clause can trump a State's attempt to regulate the physical importation of alcohol for use by its residents. On the contrary, the Court has repeatedly held that States have "virtually complete control" over the physical importation of alcohol. *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). States therefore may impose any regulation of physical importation without offending the Commerce Clause if there is any reasonably conceivable state of facts that could provide a rational basis for the regulation.

### A. The Plain Words of the Twenty-first Amendment Prohibit What the Plaintiffs Seek To Do Here.

The text of the Amendment is broad and unequivocally prohibits what the plaintiffs seek to do and what the Sixth Circuit authorized them to do. The Twenty-first Amendment provides:

> The transportation or importation into any State ... for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

U.S. Const. amend. XXI, § 2.

The constitutional text resolves the present question. "[W]hen the ... language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (internal quotation omitted); *see also Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992) ("We have stated time and again that courts must presume that a legislature says ... what it means and means ... what it says ....").

The Twenty-first Amendment is a detailed provision, whose broad language was obviously chosen with some care. There is no ambiguity that would require this Court to construct an extratextual standard in this case. On the contrary, as the Court said in 1936, when first asked to interpret the then-very-recent Amendment, "the language of the amendment is clear," *State Board of Equalization* v. *Young's Market Co.*, 299 U.S. 59, 63-64 (1936), and "confer[s] upon the State the power to forbid all importations which do not comply with the conditions which it prescribes," *id.* at 62. And as a textual matter, there is no justification for ignoring the plain words of one Constitutional provision to honor an inference drawn from another. As Justice Jackson wrote in another case where a party invoked the dormant Commerce Clause as protection against liability for violating the Twenty-first Amendment, the plaintiffs ask the Court "to hold that one provision of the Constitution guarantees

[them] an opportunity to violate another. The law is not that tricky." *Duckworth* v. *Arkansas*, 314 U.S. 390, 397 (1941) (Jackson, J., concurring in result).

### B. The Plain Words of the Webb-Kenyon Act Also Prohibit What the Plaintiffs Seek To Do Here, and the Commerce Clause Therefore Is Not "Dormant" in This Case.

The Commerce Clause is not "dormant" in this case. The text of the Webb-Kenyon Act (on which the Twenty-first Amendment was based) is similarly broad and also unequivocally prohibits what the Sixth Circuit authorized the plaintiffs to do. The Webb-Kenyon Act, first enacted in 1913 and then again in 1935, provides:

> The shipment or transportation ... of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind from one State ... into any other State ... which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State ... is prohibited.

27 U.S.C. § 122 (2004).

In re-enacting Webb-Kenyon in 1935,[1] Congress exercised its own Commerce Clause authority to affirm state au-

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[1] Congress's stated purpose in re-enacting Webb-Kenyon was to eliminate any inference that certain legislative actions associated with Repeal had implicitly repudiated Webb-Kenyon. In 1933, prior to ratification of the Twenty-first Amendment, Congress enacted the Cullen Beer Act to permit the sale of low-alcohol beer. Act of Mar. 22, 1933, ch. 4, 48 Stat. 16. Section 6 of that statute had repeated the language of the Webb-Kenyon Act with respect to such low-alcohol beverages. When Congress repealed the Cullen Beer Act in 1935, it was concerned that "there is room for argument that the Cullen Act effected a partial amendment of the Webb-Kenyon Act, and the repeal of that amendment leaves a gap in the Webb-Kenyon Act as to liquors containing 3.2 percent or less of alcohol by weight." S. Rep. No. 74-1330, at 5 (1935); H.R. Rep. No. 74-1601, at 6 (1935). Congress therefore dispelled any possible confusion by formally

thority over physical importation of beverage alcohol and to take such regulations outside the dormant Commerce Clause. This statute, too, bars dormant Commerce Clause scrutiny of state regulation of such importation. "If Congress ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge." *Western & S. Life Ins. Co.* v. *State Bd. of Equalization*, 451 U.S. 648, 652-653 (1981).[2] "Once Congress acts, courts are not free to review state ... regulations under the dormant Commerce Clause. When Congress has struck the balance it deems appropriate, the courts are no longer needed to prevent States from burdening commerce, and it matters not that the courts would invalidate the state ... regulation under the Commerce Clause in the absence of congressional action." *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 154 (1982). Congress's re-enactment of Webb-Kenyon makes explicit the intention of Congress (as well as the Nation in the Twenty-first Amendment) that state regulation of the physical importation of alcohol be unconstrained by the dormant Commerce Clause.

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re-enacting Webb-Kenyon. *See also* Br. for the United States as Amicus Curiae, *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, No. 79-97, at 43 (Jan. 7, 1980) ("U.S. *Midcal* Amicus Br.").

[2] In *Western & Southern*, this Court followed its prior holding in *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408 (1946), and held that the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 *et seq.*, removed all dormant Commerce Clause limitations on the authority of the States to regulate and tax the business of insurance. 451 U.S. at 652-655. Western & Southern had argued that the statute did not permit "anti-competitive state taxation that discriminates against out-of-state insurers." *Id.* at 653 (internal quotation omitted). The Court rejected the argument, stating that "[t]he unequivocal language of the Act suggests no exceptions." *Id.*

### C. The Purpose of Both the Twenty-First Amendment and Webb-Kenyon Was To Create an Exception to the Dormant Commerce Clause With Respect to a Single Product—Beverage Alcohol—That the Nation Believed the States Should Have Broad Power To Regulate.

The broad plain meaning of the texts of the Twenty-first Amendment and Webb-Kenyon is supported by their history. They were explicitly intended to create an exception to the dormant Commerce Clause, allowing States not only to bar importation of beverage alcohol but also to permit importation and channel it through licensed entities.

Since the founding of the Nation, the States have played an especially large role in regulating the use of beverage alcohol by their residents. In the *License Cases*, 46 U.S. (5 How.) 504 (1847), this Court "recognized a broad authority in state governments to regulate the trade of alcoholic beverages within their borders free from implied restrictions under the Commerce Clause." *Craig* v. *Boren*, 429 U.S. 190, 205 (1976). In 1873, the Court said, "It has never been seriously contended" that "the right of the States to regulate traffic in intoxicating liquors" "raise[s] any question growing out of the Constitution of the United States." *Bartemeyer* v. *Iowa*, 85 U.S. (18 Wall.) 129, 132 (1873). Rather, regulation of such traffic "fall[s] within the police regulations of the States, left to their judgment, and subject to no other limitations than such as [a]re imposed by the State constitution, or by the general principles supposed to limit all legislative power." *Id.*

Later in the century, however, the Court undercut state control by invalidating state restrictions on physical importation under the dormant Commerce Clause. The consequence was to expose state limits on the use of alcohol by their citizens to circumvention via direct shipment from out of state. As this Court explained in *Craig*, "This led Congress, acting pursuant to its powers under the Commerce Clause, to reinvigorate the State's regulatory role through

the passage of the Wilson and Webb-Kenyon Acts." *Craig*, 429 U.S. at 205 (footnotes omitted).

In 1890, the Court held in *Leisy* v. *Hardin*, 135 U.S. 100 (1890), that the dormant Commerce Clause immunized imported liquor from state regulation as long as it remained in its "original package." This decision crippled a State's ability to prohibit or regulate its citizens' use, possession, or sale of alcoholic beverages, because merchants could import beverages and resell them in the "original package."[3] Clearly disapproving of this result, Congress responded just months later with legislation designed to withdraw federal authority over the local effects of interstate alcohol traffic. The Wilson Act[4] empowered States to regulate alcohol "upon arrival," whether or not in an original package. The Court upheld that statute, *In re Rahrer*, 140 U.S. 545 (1891), but then construed it narrowly, holding that alcohol did not "arrive" in a State until received by the consignee, *Rhodes* v. *Iowa*, 170 U.S. 412 (1898). Direct interstate shipments to consumers (the conduct at issue in the present case) thus remained outside the control of the States.

In 1913, Congress enacted the Webb-Kenyon Act in order to deal with this interference with state control.[5] Webb-Kenyon prohibited any "shipment or transportation" of alcohol intended "to be received, possessed, sold, or in any man-

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[3] *See* Boris I. Bittker & Brandon P. Denning, *Bittker on the Regulation of Interstate and Foreign Commerce* § 9.02 (1999) ("[*Leisy*] opened the door to so-called original package saloons, which sold liquor while still in the original package to their patrons, thus frustrating the temperance movement unless police were stationed on every street corner.").

[4] Act of Aug. 8, 1890, ch. 728, 26 Stat. 313 (codified at 27 U.S.C. § 121).

[5] 49 Cong. Rec. 707 (1913) (Sen. Kenyon explaining that legislation was needed to "permit the States to exercise their reserved police power without interference by the Federal Government"); *see also id.* at 2,812 (Rep. Webb explaining that the Webb-Kenyon Act "would remove the shackles of interstate-commerce law from the action of the States, and discontinue the handicap under which they now labor in enforcing their police regulations").

ner used" in violation of the terminating State's laws. 27 U.S.C. § 122. The statute's intent to create a blanket exception to the dormant Commerce Clause was made clear by its title: "An Act divesting intoxicating liquors of their interstate character in certain cases."

In 1917, a divided Court upheld the constitutionality of Webb-Kenyon and affirmed that it created an exception to the dormant Commerce Clause for the importation of alcohol. *Clark Distilling Co.* v. *Western Md. Ry.*, 242 U.S. 311 (1917). The Court stated that the purpose of Webb-Kenyon was to do what the Wilson Act had failed to do: "prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught." *Id.* at 324; *see also id.* at 325 (Webb-Kenyon "took the protection of interstate commerce away from all receipt and possession of liquor prohibited by state law.").

With the "Great Experiment" of Prohibition in 1919, "the uneasy tension between the Commerce Clause and state police power temporarily subsided." *Craig*, 429 U.S. at 205. The ratification of the Eighteenth Amendment and the enactment of the Volstead Act[6] to implement the Eighteenth Amendment created a federal bar on the manufacture, sale, and transportation of all beverage alcohol within the United States.

In 1933, however, Prohibition ended with the adoption of the Twenty-first Amendment, and the States were given permanent constitutional control over interstate physical traffic in beverage alcohol. Section 1 of the Amendment repealed the Eighteenth Amendment.[7] Section 2, in language clearly modeled on Webb-Kenyon, prohibited the "importa-

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[6] Act of Oct. 28, 1919, 41 Stat. 305.

[7] U.S. Const. amend XXI, § 1 ("The eighteenth article of amendment to the Constitution of the United States is hereby repealed.").

tion into any State ... for delivery or use therein of intoxicating liquors, in violation of the laws thereof."

The Amendment was explicitly intended to incorporate Webb-Kenyon into the Constitution and ensure that Webb-Kenyon's guarantee of state authority to regulate alcohol could never be overturned by a future Court (or Congress). The floor manager of the bill, Senator John Blaine,[8] described the Judiciary Committee's view that because Webb-Kenyon was sustained in *Clark* by a "divided opinion," Congress should "write permanently into the Constitution a prohibition along that line," namely Section 2. 76 Cong. Rec. 4,141 (1933). Similarly, Senator Borah, another leading proponent of Section 2, concluded that "justice and fairness to the States" required "incorporating it permanently in the Constitution of the United States." *Id.* at 4,172.

The path to adoption of the Twenty-first Amendment confirms that Congress specifically intended the States to have the power to control imports, as a foundation for all state control over beverage alcohol. The version of the Amendment reported out of the Senate Judiciary Committee contained a Section 3 giving "Congress ... concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold." 76 Cong. Rec. at 4,138.[9] But after strong criticism from legislators who pointed out that "concurrent" federal power would effectively negate state regulatory power over alcohol,[10] Con-

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[8] This was Senator Blaine of Wisconsin, not the notorious Senator James G. Blaine of Maine. *See Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (plurality opinion of Thomas, J.).

[9] *See generally 324 Liquor Corp.* v. *Duffy*, 479 U.S. 335, 353-356 (1987) (O'Connor, J., dissenting).

[10] *See* 76 Cong. Rec. 4,177 (1933) (Sen. Hugo Black arguing that Section 3 "would take away from every State in the Union the right to determine how it would regulate the liquor traffic within its boundaries .... I am opposed to that."); *id.* at 4,143 (Sen. Blaine explaining that "under section 3 the proposal is to take away from the States the powers that the States would have in the absence of the eighteenth amendment. My view therefore is that section 3 is inconsistent with section 2 ....").

gress eliminated Section 3. Congress thus preserved the primary role of Section 2, which was, as Senator Blaine put it, "to restore to the States by constitutional amendment absolute control in effect over interstate commerce affecting intoxicating liquors which enter the confines of the States." *Id.* at 4,143. An array of Senators and Representatives offered similar interpretations.[11]

The path to adoption also makes it clear that the Twenty-first Amendment was intended not merely to allow "dry" States to exclude beverage alcohol, but also to provide a foundation for "wet" States to regulate its distribution and use within their borders. The Amendment was intended, as noted, to constitutionalize Webb-Kenyon. Prior to 1933, this Court had interpreted Webb-Kenyon to authorize a State to regulate imports, not merely to bar them: the Court had upheld state authority under Webb-Kenyon to require publication of the names of persons importing liquor, *Seaboard*

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[11] *See, e.g., id.* at 4,172 (Sen. Borah stating that the Amendment "promise[s] . . . local self-government, State rights, the right of the people of the respective States to adopt and enjoy their own policies"); *id.* at 4,219 (Sen. Walsh stating that "[t]he purpose of [Section 2] [i]s to make the intoxicating liquor subject to the laws of the State once it passe[s] the State line and before it gets into the hands of the consignee as well as thereafter"); 76 Cong. Rec. 2,776 (Rep. Lea, speaking against section 2, characterizing it as "the extreme of State rights" because it would require the federal government to enforce the "many varied, and perhaps unwise, provisions that might be written by the various States of the country"); *id.* at 4,225 (Sen. Swanson asking, and Sen. Robinson confirming, that "it is left *entirely to the States* to determine in what manner intoxicating liquors shall be sold or used and to what places such liquors may be transported") (emphasis added); *id.* (Sen. Robinson stating that section 2 "leaves to the States the power of regulation"); *id.* at 4,514 (Rep. Celler stating that "[e]ach State must determine for itself the type of supervision it wishes over the distribution of liquor"); *see also* U.S. *Midcal* Amicus Br. at 45 ("The debates on the Twenty-First Amendment [show that] the states' power to regulate liquor, whether moving in intrastate or interstate commerce, was to be relieved of the limitations imposed by the Commerce Clause *simpliciter*.").

*Air Line Ry.* v. *North Carolina*, 245 U.S. 298 (1917),[12] and to restrict the amount of alcohol an individual could import and impose detailed labeling requirements on imports, *Ranier Brewing Co.* v. *Great N. Pac. S.S. Co.*, 259 U.S. 150, 153-154 (1922).[13] Congress's subsequent use of language parallel to Webb-Kenyon in the Twenty-first Amendment must be interpreted to incorporate this interpretation of that language. *See, e.g.*, *Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998) ("When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well."); *Holder* v. *Hall*, 512 U.S. 874, 961 (1994) (separate opinion of Stevens, J.) ("[W]hen Congress reenacts a statute with knowledge of its prior interpretation, that interpretation is binding on the Court."); *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978).

The path to adoption also makes clear that the Amendment was understood not to require States to treat in-state and out-of-state firms identically or equally. When it enacted Webb-Kenyon, Congress was presumably aware of extensive litigation about whether States were required to afford in-state and out-of-state firms identical treatment, and it edited Webb-Kenyon to remove any such require-

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[12] *See Seaboard*, 245 U.S. at 304 ("The challenged act instead of interposing an absolute bar against all shipments, as it was within the power of the State to do, in effect permitted them upon conditions intended to secure publicity, to the end that public policy might not be set at naught by subterfuge and indirection. The greater power includes the less.").

[13] In 1913, Representative Webb emphasized that Webb-Kenyon "applies to all States, 'wet' and 'dry' alike, because every State in the Union has laws against the unrestricted sale of liquor, and this bill would protect the 'wet' States whose laws are to be violated in the use or sale of liquor as well as it would protect the 'dry' States under the same circumstances. It is a State rights measure. . . . This bill might well be styled a local option act to give the various States power to control the liquor traffic as to them might seem best." 49 Cong. Rec. 2,812 (1913).

ment. The cases included *Tiernan* v. *Rinker*, 102 U.S. 123, 127 (1880) (declaring Texas statute "inoperative, so far as it makes a discrimination against wines and beer imported from other States"), and *Scott* v. *Donald*, 165 U.S. 58, 101 (1897) (invalidating South Carolina statute as "an unjust preference of the products of the enacting State as against similar products of the other States"). The initial draft of the Webb-Kenyon Act would have granted States only the right to regulate imported products on a nondiscriminatory basis, but the bill was amended to cover all imports and eliminate any reference to discrimination. *See* 49 Cong. Rec. 2,687, 2,919-2,920, 2,924 (1913); *Dugan* v. *Bridges*, 16 F. Supp. 694 (D.N.H. 1936). The Twenty-first Amendment constitutionalized Webb-Kenyon, and (as we show below) the understanding of those who lived through its adoption was that States were not required to treat out-of-state and in-state firms alike.

Finally, any doubt about Congress's own intent with respect to state power over physical importation was eliminated when Congress re-enacted the Webb-Kenyon Act in 1935. By re-enacting the language it had enacted in 1913, Congress ratified this Court's intervening interpretation of Webb-Kenyon as creating a general exception to the dormant Commerce Clause for both wet and dry States.

### D. This Court's Cases Interpreting the Twenty-first Amendment Make Clear That States May Adopt Any Rational Scheme of Regulation of Physical Importation of Beverage Alcohol—Much as Congress May Adopt Any Rational Scheme of Regulating Interstate Traffic in Other Products.

This Court has ruled over and over that the Twenty-first Amendment gave the States a power to regulate the physical importation of alcohol that is not limited by the Commerce Clause. From the earliest cases to its most recent pronouncements, this Court has consistently held that "the States' regulatory power over this segment of commerce is . . . largely 'unfettered by the Commerce Clause.'" *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 514-515

(1996) (quoting *Ziffrin, Inc.* v. *Reeves*, 308 U.S. 132, 138 (1939)). Under this Court's cases, a state law regulating the physical importation of alcohol might, of course, be subject to "rational basis" scrutiny under the Due Process Clause or the Equal Protection Clause, just as similar scrutiny might be applied to congressional regulation of other parts of interstate commerce. And state regulation of beverage alcohol is of course subject (like congressional regulation of commerce) to the First Amendment and other provisions of the Constitution. But rational state regulation of physical importation is not limited by the dormant Commerce Clause. On the contrary, this Court's cases make clear that state regulation of this one product is at least as free from economic second-guessing by the courts as is congressional regulation of other parts of commerce. The heightened judicial scrutiny endorsed by the Sixth Circuit would impermissibly push the courts into an area expressly reserved to the States by both the Constitution and Congress.

This Court's early cases, decided unanimously in the immediate wake of the Twenty-first Amendment (and by Justices who had lived through Prohibition and Repeal) and never explicitly or implicitly overruled, make it clear that state power over importation is far broader than needed here to uphold Michigan's statute—and, in particular, that States may impose rational conditions on imports that are not imposed on domestic products. Immediately after Repeal, the States used their constitutional authority to enact distribution systems that drew various distinctions between in-state and out-of-state alcohol, and the Court was immediately confronted with claims that States had unconstitutionally "discriminated" against out-of-state alcohol. In *Young's Market*—the first Twenty-first Amendment case to come before the Court—the Court upheld a California statute that imposed a $500 license fee for wholesalers to import beer. California imposed no analogous fee for locally produced beer, but the Court, speaking through Justice Brandeis, ruled that the Amendment "confer[s] upon the State the power to forbid all importations which do not comply with the conditions which it prescribes." 299 U.S. at 62. The

Court flatly rejected the argument that if a State permits the manufacture and sale of alcohol "it must let imported liquors compete with the domestic on equal terms." *Id.* Indeed, the Court said, it cannot "be doubted" that a State could permit the sale of local brews and prohibit all competing imports. *Id.* at 63.

One term later, in *Mahoney* v. *Joseph Triner Corp.*, 304 U.S. 401 (1938), the Court unanimously reaffirmed *Young's Market* and upheld a Minnesota statute that prohibited the importation of strong alcohol beverages (*i.e.*, greater than 25 percent alcohol) but permitted their sale if produced in-state. The statute "clearly discriminate[d] in favor of liquor processed within the State," *id.* at 403, but Justice Brandeis, again speaking for the Court, refused to "rewrit[e]" the Twenty-first Amendment to limit state power and noted that *Young's Market* had "settled" that "discrimination against imported liquor is permissible," *id.* at 403-404. The next term, in *Indianapolis Brewing Co.* v. *Liquor Control Commission*, 305 U.S. 391 (1939), the Court addressed a Michigan statute that discriminated against out-of-state alcohol by prohibiting Michigan dealers from selling any beer from Indiana and nine other States. The Court unanimously affirmed the statute's constitutionality, broadly holding that "the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause." *Id.* at 394. In the 1941 *Duckworth* case, Justice Jackson explained why the Court treated state alcohol regulations with such deference:

> The people of the United States knew that liquor is a lawlessness unto itself. They determined that it should be governed by a specific and particular constitutional provision. They did not leave it to the courts to devise special distortions of the general rules as to interstate commerce to curb liquor's 'tendency to get out of legal bounds.' It was their unsatisfactory experience with that method that resulted in giving liquor an exclusive place in constitutional law . . . .

314 U.S. at 398-399 (Jackson, J., concurring in result).

The Court did not in its early cases identify what power *Congress* retained under the Commerce Clause to regulate beverage alcohol, but the Court has never deviated from its holding that, in the absence of contrary congressional regulation, state power over importation was unconstrained by the dormant Commerce Clause. In 1944, for example, Justice Black—who had served in the Senate that enacted the Twenty-first Amendment—wrote that although "the precise amount of power [the Amendment] has left in Congress to regulate liquor under the Commerce Clause has not been marked out by decisions," he doubted "that state statutes regulating intoxicating liquor should *ever* be invalidated by this Court under the Commerce Clause except where they conflict with valid federal statutes." *Carter* v. *Virginia*, 321 U.S. 131, 138 (1944) (Black, J., concurring) (emphasis added); *see also id.* at 140 (Frankfurter, J., concurring) ("[T]he range of State control over liquor has been extended by the Twenty-first Amendment beyond the permissive bounds of the Commerce Clause.").

The Court later did address what power Congress retained, but these cases—sometimes portrayed as cutting back on the Court's earlier broad interpretations of state power—*reiterate* that the dormant Commerce Clause does not curb state authority over alcohol importation. In *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964), *Midcal*, *supra*, and *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984), the Court was forced to balance state alcohol regulations against affirmative exercises of Congress's power under the Commerce Clause. In each case, the federal power [illegible]on.[14] (No such issue is presented

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[14] *See Hostetter*, 377 U.S. at 334 (State cannot "prevent transactions carried on under the aegis of a law passed by Congress in the exercise of its explicit power under the Constitution to regulate commerce with foreign nations."); *Midcal*, 445 U.S. at 114 ("The unsubstantiated state concerns put forward in this case simply are not of the same stature as the goals of the Sherman Act."); *Capital Cities*, 467 U.S. at 716 ("As in *Midcal Aluminum* . . . we hold that when, as here, a state regulation squarely

here because Congress has, in the Webb-Kenyon Act, exercised its authority in a manner entirely consistent with and supportive of state importation restrictions.) *Hostetter*, *Midcal*, and *Capital Cities* themselves stated emphatically, however, that in the absence of an exercise of Congress's power, the dormant Commerce Clause is inapplicable against state alcohol regulations:

> This Court made clear in the early years following adoption of the Twenty-first Amendment that . . . a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders. . . . This view of the scope of the Twenty-first Amendment . . . has remained unquestioned.

*Hostetter*, 377 U.S. at 330; *see also Midcal*, 445 U.S. at 110 ("The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system."); *Capital Cities*, 467 U.S. at 712 ("§ 2 reserves to the States power to impose burdens on interstate commerce in intoxicating liquor that, absent the Amendment, would clearly be invalid under the Commerce Clause.").

The Court has, of course, repeatedly held that the Twenty-first Amendment does not allow the States to "ignore their obligations under *other* provisions of the Constitution," *Capital Cities*, 467 U.S. at 712 (emphasis added), any more than Congress itself, when legislating under the Commerce Clause, can ignore other constitutional limitations. *See, e.g., Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116 (1982)

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conflicts with the accomplishment and execution of the full purposes of federal law, and the State's central power under the Twenty-first Amendment of regulating the times, places, and manner under which liquor may be imported and sold is not directly implicated, the balance between state and federal power tips decisively in favor of the federal law, and enforcement of the state statute is barred by the Supremacy Clause.").

(Massachusetts statute regulating location of liquor licensees violated Establishment Clause); *Craig, supra* (Oklahoma gender-biased minimum-drinking age law violated Equal Protection Clause); *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971) (Wisconsin statute forbidding alcohol sales to certain persons violated Due Process Clause); *Department of Revenue* v. *James B. Beam Distilling Co.*, 377 U.S. 341 (1964) (Kentucky tax on foreign whiskey violated Export-Import Clause). But these cases do not suggest that the dormant Commerce Clause imposes any limitation on state authority. To the contrary, they strongly reiterate plenary state power. *See, e.g., Craig*, 429 U.S. at 206 ("This Court's decisions . . . have confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause."); *James B. Beam Distilling*, 377 U.S. at 346 ("We have no doubt that under the Twenty-first Amendment Kentucky could not only regulate, but could completely prohibit . . . importation . . . . There can surely be no doubt, either, of Kentucky's plenary power to regulate and control . . . the distribution, use, or consumption of intoxicants within her territory after they have been imported.").

The Twenty-first Amendment and Webb-Kenyon empower a State to regulate interstate shipments for "delivery and use" within the State, and the Court has been careful not to allow States to project their power beyond their borders. In *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U.S. 573 (1986), and *Healy* v. *Beer Institute, Inc.*, 491 U.S. 324 (1989), for example, the Court invalidated state statutes that "directly control[led] commerce occurring wholly outside the boundaries of a State," *Healy*, 491 U.S. at 336, by effectively dictating alcohol prices in other States. *See Brown-Forman*, 476 U.S. at 585 (Twenty-first Amendment "confers no authority to control sales in other States"); *Healy*, 491 U.S. at 342.[15] Similarly, *Hostetter*

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[15] The *Healy* Court also condemned the Connecticut statute on the secondary ground that it discriminated against interstate commerce, and Justice Scalia concurred only in this second ground. But the discrimina-

invalidated a New York statute that regulated alcohol for which "ultimate delivery and use [was] not in New York, but in a foreign country." 377 U.S. at 333.[15] None of these cases, however, imposes or suggests any constriction of state power with respect to circumstances that *are* covered by the Twenty-first Amendment, such as when a State exercises its core power to regulate the importation of alcohol for use in the State.

*Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984)—the case on which the Sixth Circuit relied most heavily—is arguably inconsistent with the long line of earlier cases,[17] but nothing in *Bacchus* suggests that the dormant Commerce Clause limits rational state regulation of physical importation for purposes of assuring responsible use of beverage alcohol and raising related revenues. The statute at issue in *Bacchus* did not purport to regulate "the transportation or importation into any State" of alcoholic beverages. More-

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tion at issue was entirely different from the present case. As between two firms, both engaged in selling beer in Connecticut, but only one of which also sold beer elsewhere, the State's pricing law would apply only to the latter, effectively penalizing firms doing business in Connecticut for engaging in business anywhere else. The distinction had nothing to do with importation (or with the State's price control objectives). Regulation of imports, the exact thing the Twenty-first Amendment allows, is inherently concerned with interstate and not domestic commerce. As Judge Easterbrook said in *Bridenbaugh* v. *Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000), "*Every* use of § 2 could be called 'discriminatory' in the sense that plaintiffs [challenging a statute indistinguishable from Michigan's] use that term, because every statute limiting importation leaves intrastate commerce unaffected." *Id.* at 853. Under the Twenty-first Amendment, the issue is whether the necessarily distinct and separate regulation of domestic commerce in beverage alcohol is so irrational as to invalidate the importation regulation.

[16] *See also Collins* v. *Yosemite Park & Curry Co.*, 304 U.S. 518 (1938) (Twenty-first Amendment did not confer on California authority to collect taxes on alcohol delivered to, and used in, park under federal sovereignty).

[17] *See Bacchus*, 468 U.S. at 278-287 (Stevens, J., dissenting); *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529, 553-556 (1991) (O'Connor, J., dissenting).

over, the challenged provision did not regulate the use of alcohol or help raise taxes. On the contrary, it was a special tax exemption for a locally produced pineapple liquor, designed to promote that particular local product. As Hawaii conceded, the *sole* purpose of the tax exemption was "to promote a local industry." *Id.* at 276 (quoting brief of Hawaii). Indeed, the State made no attempt in the lower courts to defend the exemption on Twenty-first Amendment or Webb-Kenyon grounds, *id.* at 274 n.12, nor did it claim that the promotion of a local beverage served any purpose underlying those provisions, *id.* at 276. This Court struck down the statute, stating that the Twenty-first Amendment does not shelter "mere economic protectionism," *id.*, but it did not even hint that rational distinctions (as in the Michigan law, *see infra* Part II) drawn in the course of regulating physical importation may be subject to heightened scrutiny.

On the contrary, as Judge Easterbrook stated in *Bridenbaugh*, "No decision of the Supreme Court holds or implies that laws limited to the importation of liquor are problematic under the dormant commerce clause." *Bridenbaugh* v. *Freeman-Wilson*, 227 F.3d 848, 853 (7th Cir. 2000); *see also Milton S. Kronheim & Co.* v. *District of Columbia*, 91 F.3d 193, 203 (D.C. Cir. 1996) ("Nothing in *Bacchus* or the other later cases overrules the principles iterated in [earlier Supreme Court cases]," including the "authority of the state under the [Twenty-first] Amendment over importation of intoxicants.").

Indeed, six years after *Bacchus*, this Court reaffirmed state power over importation in *North Dakota* v. *United States*, 495 U.S. 423 (1990). Justice Stevens, writing for a four-Justice plurality (which included Justice White, the author of *Bacchus*), noted that "[u]nder the State's regulatory system, ... out-of-state ... suppliers may sell to only licensed wholesalers or federal enclaves." *Id.* at 428. The creation of such a system, he said, "fall[s] within the core of the State's power under the Twenty-first Amendment" and is "unquestionably legitimate." *Id.* at 432. Justice Scalia, concurring in the result, said, without qualification, "The

Twenty-first Amendment ... empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler." *Id.* at 447. No Justice disagreed on this point.

The Sixth Circuit attempted to distinguish *North Dakota* on the ground that it "did not implicate the Commerce Clause" (Pet. App. 15a), but that is entirely wrong. The essential premise of *North Dakota* was that the State had the power, unfettered by the Commerce Clause, to require that all imported beverage alcohol pass through licensed in-state firms. It was only on that premise that the disputed question in the case—what steps the State could take to prevent diversion of federal-enclave alcohol—arose. The four dissenters did not question the premise, although they disagreed on the federal enclave issue. The Court obviously did not unanimously overlook a Commerce Clause problem that would have required a different result if the case had involved any other product.

Finally, this Court has never suggested (as the Sixth Circuit held) that state regulation of importation of beverage alcohol must be narrowly tailored or is otherwise subject to "strict scrutiny." On the contrary, this Court's cases are consistent with the evident and stated intention of the Twenty-first Amendment and Webb-Kenyon to give the States broad discretionary power over importation of beverage alcohol that is comparable to Congress's power over interstate traffic in other products. When Congress adopts a law regulating interstate commerce, courts ask only whether the means selected by Congress are "reasonably adapted to the end permitted by the Constitution." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981) (internal quotation omitted). Congress may not, of course, adopt a classification that violates the freedom of speech guaranteed by the First Amendment or improperly discriminates on the basis of race or religion. But if the law imposes an economic classification "that neither proceeds along suspect lines nor infringes fundamental constitutional rights," courts ask only whether "there is any *reasonably*

*conceivable* state of facts that could provide a rational basis for the classification." *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 313 (1993) (emphasis added). "On rational-basis review, . . . those attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it. Moreover, because [courts] never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Id.* at 314-315 (citations and internal quotation omitted). As the Court has often explained in this context, "Where . . . there are plausible reasons for [a legislature's] action, our inquiry is at an end. . . . This is particularly true where the legislature must necessarily engage in a process of line-drawing . . . [because] the fact the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." *United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. 166, 179 (1980).

Applying this "most relaxed and tolerant form of judicial scrutiny," *Dallas* v. *Stanglin*, 490 U.S. 19, 26 (1989), the Court has declined over and over again to second-guess Congress's use of its Commerce Clause power to draw economic distinctions that have a "conceivable" rational justification. *See, e.g., Beach Communications*, 508 U.S. at 316-320 (affirming Congress's authority to impose different regulatory burdens on cable television operators); *Fritz*, 449 U.S. at 174-179 (affirming Congress's authority to assign different retirement benefits to railroad workers).[18] The Court also extends this same deference to state legislatures' use of their police powers. *See, e.g., Nordlinger* v. *Hahn*, 505 U.S.

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[18] *See also Preseault* v. *ICC*, 494 U.S. 1, 17, 19 (1990) (If "a regulated activity affects interstate commerce . . . we must ensure only that the means selected by Congress are reasonably adapted to the end permitted by the Constitution. . . . The process of legislating often involves trade-offs, compromises, and imperfect solutions, and our ability to imagine ways of redesigning the statute to advance one of [the legislature's] ends does not render it irrational." (citations and internal quotation omitted)).

1, 11 (1992) (upholding California law imposing different tax assessments on new and existing homeowners); *McGowan* v. *Maryland*, 366 U.S. 420, 426 (1961) (upholding Maryland law exempting some but not all businesses from generally applicable "Blue Law" forbidding commercial activity on Sunday).

At the least, such deference is appropriate for States acting under the authority conferred by the Twenty-first Amendment. The Amendment was intended to restore state power over alcohol traffic and to protect against federal encroachment. It would be ironic, in the face of the Amendment and Congress's own allocation of power to the States in Webb-Kenyon, for this Court nonetheless to subject state regulation to heightened review—scrutiny that Congress itself does not face. State regulation of this one product, if rationally designed to serve a Twenty-first Amendment purpose, should be as free from economic second-guessing by the courts as is congressional regulation of other parts of commerce. The tax scheme in *Bacchus*, which Hawaii expressly denied had any regulatory purpose related to the Amendment, failed this rational basis test. As discussed below, Michigan's distinction between out-of-state wineries and state licensees with a substantial in-state presence easily passes it.

## II. MICHIGAN'S BAR AGAINST DIRECT SALES OF IMPORTED ALCOHOLIC BEVERAGES IS NOT RENDERED INVALID BY ITS ENTIRELY RATIONAL DECISION TO ALLOW LICENSED IN-STATE WINERIES TO SHIP THEIR PRODUCTS DIRECTLY TO CONSUMERS.

The Sixth Circuit treated Section 2 of the Twenty-first Amendment as having no force in this case, and ignored Webb-Kenyon entirely, because Michigan permits licensed in-state manufacturers to ship wine directly to consumers. But Michigan's treatment of both foreign and domestic wineries reflects an entirely rational legislative judgment.

As the Sixth Circuit recognized, Michigan does not bar the importation of out-of-state wine or otherwise prevent any out-of-state manufacturer from distributing its products

in the State. *See* Pet. App. 13a. All wines, no matter where produced, can be sent to a Michigan resident's home by an appropriate in-state licensee, subject to Michigan regulations and effective sanctions should the in-state licensee fail to comply with Michigan law. The "discrimination" the Sixth Circuit found is that Michigan requires non-Michigan manufacturers to ship wine to licensed in-state wholesalers, but permits licensed in-state wineries to sell their products directly to consumers. But in both cases, Michigan is simply demanding that beverage alcohol pass through the hands of licensees with a substantial in-state physical presence that makes them subject to effective state regulation. Michigan has judged that a firm that manufactures wine in the State, and can be put out of business if it behaves improperly, is sufficiently within the reach of Michigan regulation that it does not need to sell through another licensee. Nothing in the Twenty-first Amendment, Webb-Kenyon, or the Commerce Clause requires Michigan to impose unnecessary burdens on in-state entities that are effectively regulated in other ways. This Court should not open the door for courts to use the dormant Commerce Clause to substitute their judgments for the States' in this sensitive area.[19]

State power to regulate alcohol imports is the foundation for achieving all other state regulatory objectives. The Nation learned in the Nineteenth Century, *see Leisy*, *supra*; *Vance* v. *W.A. Vandercook Co. (No. 1)*, 170 U.S. 438 (1898), and this Court reiterated as recently as *North Dakota*, that States must be able to regulate the terms and conditions of importation if they are to be able to control alcohol use and collect alcohol taxes. That is why Michigan adopted a regulatory scheme that channels all beverage alcohol through licensed firms that have a substantial permanent physical

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[19] *Cf. Tyler Pipe Indus., Inc.* v. *Washington State Dep't of Revenue*, 483 U.S. 232, 265 (1987) (Scalia, J., concurring in part and dissenting in part) ("It is astonishing that we should be expanding our beachhead in this impoverished territory, rather than being satisfied with what we have already acquired by a sort of intellectual adverse possession.").

presence in the State and thus can be effectively disciplined for noncompliance in this process. They are subject to inspections of their books and records and physical premises by the State. *See* Mich. Comp. Laws §§ 436.1217, 436.1235. They have important in-state property subject to attachment by the State. *See id.* § 436.1911. And the State can put them entirely out of business for serious violations. *See id.* §§ 436.1903, 436.1905, 436.1907, 436.1909, 436.1917.

Out-of-state winemakers are in an entirely different situation. To begin with, no State has unlimited enforcement resources, and Michigan simply cannot, as a practical matter, check the backgrounds, inspect the records, or monitor the regulatory compliance of an unlimited number of wineries all over the Nation. (The number has been estimated at over 2,100, but the even more important point is that Michigan has no way of controlling that number, or limiting the number of websites to which its children have access.) In upholding New York's similar regulatory scheme, the Second Circuit explained well the difficulties faced by state alcohol regulators in regulating out-of-state entities:

> In 2000, there were over 2,100 wineries in the country, a 275% increase since 1975. Requiring New York officials to traverse the country to ensure that direct sales to consumers (no matter how small) comply with New York law would render the regulatory scheme useless. Section 2 does not require that New York bear the burden in attempting to ensure proper compliance with its tax and regulatory system regarding imported wine.

*Swedenburg* v. *Kelly*, 358 F.3d 223, 238-239 (2d Cir. 2004) (footnote omitted).

But the even more fundamental point is that Michigan has concluded it cannot effectively police sales by manufacturers located entirely outside the State. It has no effective ability to inspect their premises or attach their property administratively for violating Michigan law. And even if it could require out-of-state wineries to obtain Michigan licenses, it could not force an out-of-state firm to treat the li-

censing process nearly as seriously, because denial or revocation of a license is a far less effective sanction against an out-of-state manufacturer (which risks losing only its sales to Michigan) than against an in-state winery, for whom license revocation means the loss of the business itself. *See Bainbridge* v. *Turner*, 311 F.3d 1104, 1116 (11th Cir. 2002) (Roney, J., dissenting) (court should not "treat[] as equal the prospective loss of a beverage license to an in-state firm and the loss of a Florida beverage license of an out-of-state firm, if one is required at all. One would put the firm out of business, the other would simply restrict the market by a state.").

Furthermore, allowing out-of state wineries to sell directly to consumers would, in fact, allow those wineries to compete unfairly with in-state firms precisely because of Michigan's inability, at a practical level, to regulate such sales. For example, taxes on sales originating out-of-state are notoriously easy to evade. Indeed, one of the injuries asserted by the plaintiffs in *Bridenbaugh* was that buying out-of-state wines from in-state dealers required them to pay the "difference in price" produced by the fact that in-state "dealers collect state excise taxes on wines that pass through their hands, while the [out-of-state] shippers with which plaintiffs used to deal do not." 227 F.3d at 849-850.[20] In-state wineries are also obviously under much greater compulsion to honor other regulatory requirements and cooperate with the Michigan Commission. Michigan's requirement that out-of-state wine go through the three-tier system ensures that out-of-state wineries cannot use direct shipment as a form of regulatory arbitrage.

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[20] *See also Bridenbaugh*, 227 F.3d at 850 ("[S]tates have insuperable problems collecting their use taxes when people buy from out-of-state vendors that do not collect sales taxes. Noncompliance is almost impossible to detect, and rampant civil disobedience ensures that a handful of prosecutions would not be effective. Private gains from violating the laws vastly exceed the anticipated legal penalties.").

Michigan rationally decided that in-state wineries could ship directly to consumers because they are subject to effective oversight and regulation. Michigan decided, as New York did, that "[p]resence ensures accountability." *Swedenburg*, 358 F.3d at 237. Michigan had no obligation to impose unneeded restrictions on in-state manufacturers merely because it required imports to go through state licensees. "Defining the class of persons subject to a regulatory requirement—much like classifying governmental beneficiaries—inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." *Beach Communications*, 508 U.S. at 315-316 (internal quotation omitted).

States particularly need regulatory flexibility today because of the potential easy availability of alcohol over the Internet. Whereas direct shipment might have posed a limited problem ten years ago, today the Internet threatens to make it a major breach of state regulatory regimes. Electronic commerce makes it conceivable that large amounts of alcohol could be sold via direct shipment, and the States are understandably concerned about the prospect of being flooded with shipments of alcohol, directly to consumers, from thousands of unaccountable out-of-state sources. *See* No. 03-1116 (petition stage), Br. of Amici Ohio and 35 Other States 1 ("The possibility that federal courts may eviscerate the States' ability to maintain their liquor control systems, as some Circuit Courts have already done, is of paramount concern to all States."). "In these credit card days of easy purchase by telephone and internet," *Bainbridge*, 311 F.3d at 1116 (Roney, J., dissenting), States need greater assistance from the courts, not new legal obstacles to enforcement.

Underage drinking is a particular concern posed by direct shipping. According to a study by the National Academy of Sciences released since the proceedings in the dis-

trict court, more young people drink alcohol than smoke tobacco or use marijuana, and underage drinking costs the nation an estimated $53 billion annually in losses stemming from traffic fatalities, violent crime, and other behaviors. *See* Richard J. Bonnie & Mary Ellen O'Connell, *Reducing Underage Drinking: A Collective Responsibility* 13, 35 (2004).[21] The study further reported that 10 percent of minors surveyed said they had obtained alcohol over the Internet or through home delivery and that "increasing use of the Internet may increase the percentage." *Id.* at 174. Expanding the availability of alcohol through direct shipments therefore poses very real dangers, and the judicial system is the last place where these types of policy decisions should be made, particularly as electronic commerce is rapidly evolving. It is the States that are on the frontline dealing with these issues, and they, not the courts, should decide when and how alcohol may enter their territory.

Finally, the potential impact of the Sixth Circuit's decision is very large. Plaintiffs have implied throughout this case that it concerns only oenophiles' access to high-end wines, but they have (thus far successfully) challenged the basic provision that bars unlicensed importation of all alcoholic beverages. Moreover, the principle they espouse is not limited to "fine and rare wines." The Constitution does not provide any basis for saying that only makers of fine and rare wines (and not all other alcoholic beverages) must be given the same direct shipment privilege given to licensed in-state wineries. And if plaintiffs were right, there would be no reason why Michigan, which allows licensed in-state retail package stores to deliver beer, wine, and distilled spirits to their customers, *see* Mich. Comp. Laws § 436.1203(2), would not be required to allow out-of-state retailers to do the same thing. Similarly, there would be no reason why Michigan, which requires wholesalers to have an in-state presence, would not be required to allow out-of-state whole-

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[21] *Available at* http://www.nap.edu/books/0309089352/html/.

salers to ship wine, beer, and distilled spirits to Michigan retailers.

In short, the path opened up by the Sixth Circuit leads far beyond giving the self-described wine connoisseurs in this case the ability to buy fine and rare wines on the telephone; it threatens to undo the "unquestionably legitimate," *North Dakota*, 495 U.S. at 432, three-tier system, imposed severally by the States, that has been the foundation of beverage alcohol regulation since the end of Prohibition.

## CONCLUSION

The judgment of the United States Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

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JENNIFER M. GRANHOLM, *et al.*,
*Petitioners,*

v.

ELEANOR HEALD, *et al.*,
*Respondents.*

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MICHIGAN BEER & WINE WHOLESALERS ASSOC.,
*Petitioner,*

v.

ELEANOR HEALD, *et al.*,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## QUESTION PRESENTED

Whether a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violates the dormant Commerce Clause in light of Section 2 of the 21st Amendment.

## STATEMENT PURSUANT TO RULE 29.6

Respondent Domaine Alfred, Inc. has no parent corporation, and no publicly held company owns 10 percent or more of its stock.

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## COUNTERSTATEMENT OF THE CASE

At issue in this case is whether the Twenty-First Amendment displaces the fundamental principle of nondiscrimination in trade across state borders that underlies our national economic union. Michigan and its partisans contend that section 2 of the Twenty-First Amendment grants each State such broad authority over the importation of liquor that a State may favor its own wine industry over wine producers from other States. The Sixth Circuit correctly rejected this claim of license to engage in geographic favoritism, holding that Michigan's discrimination against commerce—based solely upon origin outside the State—violates the dormant Commerce Clause and cannot be saved from unconstitutionality by section 2 of the Twenty-First Amendment.

1. The interstate commerce in which the plaintiffs seek to engage arises from the growth of small family farm wineries across the nation in recent decades. Domestic grape production tripled between 1985 and 2000, and domestic wine production now contributes $45 billion annually to the national economy. WineAmerica, *Wine Facts*.[1] A relatively small number of large wineries dominate the national market, producing large quantities of wine and distributing it nationally through the so-called "three-tier" regulatory system for alcohol distribution that arose after the repeal of Prohibition. Under this system, producers of alcoholic beverages are typically required to sell their products to licensed wholesalers or distributors, who in turn sell to retailers, who in turn sell to consumers. *See* 03-1120 Br. 6; 03-1116 Br. 6; *see also* Staff of the Federal Trade Commission, *Possible Anticompetitive Barriers to E-*

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[1] Available at http://www.americanwineries.org/winedata/winefacts04.htm (last visited Sept. 20, 2004).

*Commerce: Wine* 5 (July 2003) (hereafter "FTC Report").[2]

An increasing proportion of American wine, however, is being produced by family farm wineries, which are now found in all 50 States and by some estimates number over 3,000—more than twice as many as 30 years ago. *See* WineAmerica, *supra*. These small, start-up concerns are often the engines of innovation in the wine industry, and have become a dynamic source of employment and productivity in many of the nation's rural areas. There has been an accompanying explosion in wine-related tourism—even in States not previously known for their wine production. *See id.*

Because many of these farm wineries produce relatively small amounts of wine, direct sales to consumers are not merely an efficient commercial vehicle, but a necessary channel for doing business. Small wineries are, as a practical matter, foreclosed from participating in the traditional three-tier distribution system because their small volumes render their products economically unattractive to wholesale distributors. The problem is compounded because the number of wholesalers that distribute wine has decreased from several thousand in the 1950s to a few hundred today, making it increasingly difficult for small wineries to find wholesalers willing to carry their products. *See* FTC Report at 6.

2. The majority of States have responded to the consumer demand for access to wines from small wineries by permitting direct shipment of wine to consumers across state lines. Twenty-six States now permit some form of direct

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[2] The comprehensive FTC Report can be found at www.ftc.gov/os/2003/07/winereport2.pdf (last visited Sept. 14, 2004). It is based on "testimony from all sides of the wine issue, including wineries, wholesalers, state regulators, and a Nobel laureate in economics." FTC Report at 2.

sales and shipments from out-of-state wineries to in-state consumers, and three other States permit limited direct ordering by consumers pursuant to a consumer permit. Some States, like New Hampshire, allow any winery to obtain a state license and make direct shipments to consumers. *See* N.H. Rev. Stat. § 178:27. Some, like Iowa, allow wineries to make direct shipments from States that extend reciprocal shipping privileges to their own wineries. *See* Iowa Code § 123.187 (2003). Some, like Arizona, allow direct shipments only for purchases made in person on site at the winery's tasting room. *See* Ariz. Rev. Stat. § 4-203.04(J) (2003). Many of these States require that out-of-state wineries obtain licenses, report sales and remit taxes on their shipments, and require that shippers obtain an adult signature to prevent wine from being delivered to minors. *See* FTC Report at 8, 26-40. States that allow direct shipping report no problems with underage access or tax evasion due to the direct shipment of wine from out of state. *See* FTC Report at 31, 38.

Reflecting this trend among the States to allow direct shipment of wine to consumers from out-of-state wineries, the National Conference of State Legislatures adopted a Model Direct Shipping Bill in 1997. The model legislation restricts the sale of wine to those persons at least 21 years of age; requires all beverages to be labeled for adult receipt only; requires all out-of-state shippers to pay appropriate taxes and keep detailed sales records; requires out-of-state shippers to obtain licenses; and requires them to submit to the importing state's regulatory authority for enforcing the act and any related statutes or regulations. *See* http://www.wineinstitute.org/MODEL%20DIRECT%20SHIPMENT%20BILL.htm (last visited Sept. 20, 2004). The model legislation addresses state concerns so effectively that, as recently as 2003, Virginia, North Carolina, and South Carolina each abandoned discriminatory regimes and enacted the model direct-shipping legislation. *See* N.C. St. § 18B-

1001.1 (2004); S.C. Code Ann. § 61-4-747 (2003); Va. Code § 4.1-112.1 (2003).

This trend among the States is facilitated by enforcement mechanisms provided by federal law. No winery may operate in any State without a federally mandated "basic permit." 27 U.S.C. § 203 (2004). The United States Tax and Trade Bureau (previously known as the BATF) may revoke the winery's federal permit if it violates the laws of any state. *Id.* § 204. And the federal Twenty-First Amendment Enforcement Act gives state Attorneys General authority to use the federal courts to sue out-of-state wineries to compel compliance with state laws. 27 U.S.C. § 122a(b) (2004).

3. Michigan has eschewed this national trend and has adopted instead discriminatory wine shipment laws that allow only in-state wineries, but not out-of-state wineries, to make direct shipments to Michigan consumers. There is no dispute that Michigan treats out-of-state wineries differently from in-state wineries. *See* 03-1116 Br. 7-9. Out-of-state wineries may not sell wine at retail and are ineligible for any license that would allow them to ship directly to Michigan consumers. *See* Mich. Comp. L. § 436.1607(1).[3] The only license available to out-of-state wineries is an "outstate seller of wine" license. Mich. Admin. Code R. 436.1705(2)(d). This license costs $300, *see* Mich. Comp. L. § 436.1525(1)(d), and enables out-of-state wineries to sell only to Michigan wholesale distributors under the traditional three-tier system, *see* Mich. Comp. L. § 436.1109(9); Mich. Admin. Code R. 436.1719(5). These two intermediate layers of transaction ensure that out-of-state wineries may sell their product to Michigan consumers only at a substantially higher

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[3] Contrary to the wholesalers' assertion that Michigan requires only a "substantial in-state physical presence" in order to direct ship, *e.g.*, 03-1120 Br. 3, 13, 35, Michigan actually does not allow an out-of-state winery to direct ship unless the winery actually becomes an in-state winery (*i.e.*, plants grapes in Michigan), *see* C.A. App. 101-02 (Stewart Interrog. 13).

price, or lower profit, than in-state products sold directly to consumers. C.A. App. 239-40 (Bridenbaugh Aff. ¶¶ 15-16); *see also* FTC Report at 22. If it cannot find a wholesaler, an out-of-state winery is foreclosed from the market altogether.

In contrast, an in-state winery may obtain a "wine maker" license that allows it to sell its own wines at retail without going through a wholesaler, Mich. Comp. L. § 436.1113(9); Mich. Comp. L. § 436.1537(2)-(3), and to ship its wine directly to consumers. Mich. Admin. Code R. 436.1011(7)(b). For a small wine maker, this license costs only $25—one-twelfth the cost to an out-of-state winery. Mich. Comp. L. § 436.1525(1)(e). The license entitles the in-state winery to receive orders from Michigan consumers via phone, Internet, or mail, and to fill those orders by shipping directly to the home of the consumer who places the order.

4. Plaintiff Domaine Alfred is one of those out-of-state wineries that is excluded from the Michigan market. It is a small winery in San Luis Obispo, California, owned and operated by Terry Speizer. Mr. Speizer produces a mere 3000 cases of wine a year.[4] Because of this limited production and small customer base, he cannot obtain a wholesaler to distribute his wine in Michigan. Even if he could find a wholesaler willing to list his wine, he could not afford to sell it through the three-tier system. Because both the wholesaler and retailer would mark up the price, Mr. Speizer would have to discount the price to the wholesaler in anticipation of those mark-ups, which would mean an unsustainable loss of revenue. He has received requests for wine from Michigan customers, but cannot fill them because of the direct shipment prohibition. C.A. App. 85 (Domaine Alfred Aff. ¶¶ 11-15).

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[4] Domaine Alfred would meet Michigan's definition of a small winery, which is a winery producing less than 50,000 gallons (20,000 cases) per year. Mich. Comp. L. § 436.1111(9).

Joining Mr. Speizer as plaintiffs are 13 Michigan wine consumers and journalists who, although stymied by Michigan's discriminatory laws, seek to purchase out-of-state wine by direct shipment. Eleanor and Ray Heald are professional wine critics, consultants and educators, who write wine reviews for major national publications. Their occupation requires that they obtain advance samples of wine sent directly to them from out-of-state wineries so that they can critique, preview and write about them. Because of the direct shipment prohibition, they have been unable to obtain those samples, have lost income, and have been hamstrung in their ability to inform the public about new wines from out of state. C.A. App. 43-48 (Heald Aff. ¶¶ 4-7, 16-17).

5. The plaintiffs filed this action against various Michigan state officials, contending that the Michigan direct shipment law discriminated against interstate commerce in violation of the dormant Commerce Clause. The state defendants argued that the Michigan regulatory scheme constituted a valid exercise of the State's power under section 2 of the Twenty-First Amendment. The Michigan Beer & Wine Wholesalers Association (hereafter "the wholesalers"), a lobbying organization for the Michigan liquor-distribution industry, intervened in support of the discriminatory regime in which out-of-state wineries must sell only to the wholesalers that comprise its membership. In a brief unpublished opinion, the district court granted summary judgment to the defendants, upholding Michigan's law based on the view that section 2 of the Twenty-First Amendment "authorizes the states to control alcohol in ways that it [sic] cannot control cheese." 03-1116 Pet. App. 33a; 03-1120 Pet. App. 33a (internal quotation omitted).

6. The Sixth Circuit (Daughtrey, J., joined by Guy and Boggs, JJ.) reversed. *See* 03-1116 Pet. App. 1-18a; 03-1120 Pet. App. 1a-17a. The court of appeals began by recognizing that, in a series of decisions immediately after ratification of the Twenty-First Amendment, the Supreme Court had

"afforded the states nearly limitless power to regulate alcohol under the new amendment." 03-1116 Pet. App. 8a; 03-1120 Pet. App. 8a. The court reasoned, however, that Michigan's reliance on those cases was "disingenuous at best because, as early as the 1960s, the Supreme Court signaled a break with this line of reasoning." 03-1116 Pet. App. 9a; 03-1120 Pet. App. 8a. Under this Court's subsequent cases, the court continued, challenges to state alcohol laws should be assessed by "determining how closely related the law in question is to the 'core concerns' of the Twenty-first Amendment." 03-1116 Pet. App. 10a; 03-1120 Pet. App. 9a.

After reviewing this Court's more recent cases, the Sixth Circuit concluded that facially discriminatory laws regulating commerce in alcohol remain subject to strict scrutiny under the dormant Commerce Clause, and that the State must prove that no reasonable nondiscriminatory alternatives are available to advance the State's compelling purposes. *See* 03-1116 Pet. App. 11a; 03-1120 Pet. App. 11a. The court "reject[ed] the implication that a state's 'virtually complete control' over liquor regulation enables it to discriminate against out-of-state interests in favor of in-state interests." 03-1116 Pet. App. 12a; 03-1120 Pet. App. 11a. According to the court, such an approach was "simply forbid[den]" by this Court's decision in *Bacchus Imports, Ltd., v. Dias,* 468 U.S. 263 (1984), which struck down a discriminatory tax exemption favoring certain locally produced alcoholic beverages at the expense of out-of-state liquor imports. 03-1116 Pet. App. 12a; 03-1120 Pet. App. 11a.

Applying this framework to the Michigan statute, the Sixth Circuit concluded that "it is clear that the Michigan statutory and regulatory scheme treats out-of-state and in-state wineries differently, with the effect of benefiting the in-state wineries and burdening those from out of state." 03-1116 Pet. App. 14a; 03-1120 Pet. App. 13a. The court noted that, under the Michigan system, in-state wineries would enjoy both greater access to consumers and greater profits by virtue

of their exemption from the three-tier system to which out-of-state wineries were subject. *See* 03-1116 Pet. App. 14a; 03-1120 Pet. App. 13a. Noting that "the relevant inquiry is not whether Michigan's three-tier system *as a whole* promotes the goals of temperance, ensuring an orderly market, and raising revenue, but whether the discriminatory scheme challenged in this case ... does so," the Sixth Circuit concluded that Michigan had not proved that it was necessary to discriminate against out-of-state wineries in order to further any of the "core concerns" of the Twenty-First Amendment and declared the law unconstitutional. *See* 03-1116 Pet. App. 15a; 03-1120 Pet. App. 14a.

7. Both Michigan and the wholesalers petitioned for rehearing by the panel and rehearing *en banc*. The Sixth Circuit denied both petitions without dissent. *See* 03-1116 Pet. App. 21a-22a; 03-1120 Pet. App. 21a-22a. Both Michigan and the wholesalers timely filed petitions for writ of certiorari on February 2, 2004. This Court consolidated the two petitions and a petition to review the Second Circuit's decision in *Swedenburg v. Kelly*, 358 F.3d 223 (2d Cir. 2004), granting certiorari on May 14, 2004 on a single question presented: "Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of Sec. 2 of the 21st Amendment?"

7. In addition to this case and *Swedenburg*, four other Courts of Appeals have recently addressed the constitutionality of state laws prohibiting the direct shipment of wine. In each, the court agreed with the Sixth Circuit that discriminatory shipment laws violate the dormant Commerce Clause despite the Twenty-First Amendment. *See Dickerson v. Bailey*, 336 F.3d 388, 403 (5th Cir. 2003); *Beskind v. Easley*, 325 F.3d 506, 516-17 (4th Cir. 2003); *Bainbridge v. Turner*, 311 F.3d 1104, 1112-13 (11th Cir. 2002); *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 853 (7th Cir.

2000). The two Courts of Appeals that upheld such bans did so only because they found no discrimination. *See Swedenburg*, 358 F.3d at 239 ("New York's regulatory scheme allows [all] licensed wineries ... direct access ... in a non-discriminatory manner"); *Bridenbaugh*, 227 F. 3d at 853 (statute does not discriminate because "Indiana insists that *every* drop of liquor pass through its three-tiered system and be subjected to taxation").

## SUMMARY OF ARGUMENT

The court of appeals' decision invalidating Michigan's discriminatory regime was clearly correct. Its holding that discriminatory wine shipment rules violate the Commerce Clause and are not saved by the Twenty-First Amendment comports with every other Court of Appeals decision to have addressed the question. The two decisions upholding state laws, upon which petitioners rely, held nothing more than that the state regimes at issue did not, in fact, discriminate against interstate commerce.

Under settled dormant Commerce Clause jurisprudence, a State's explicit discrimination against out-of-state articles of commerce faces "a virtually *per se* rule of invalidity." *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Michigan draws just such an impermissibly invidious line at the state border. The winery "outside the gates" is forbidden to engage in precisely the same commercial activity permitted "within the city walls." That distinction, based solely on geography, is utterly inimical to the idea of national economic union. It is forbidden by the Commerce Clause.

Nor is Michigan's discriminatory apparatus saved by section 2 of the Twenty-First Amendment. This Court's cases make clear that States enjoy greater authority over liquor than they do over, say, milk. Yet this Court has also consistently invalidated state liquor regulations (no less than state milk regulations) that discriminate against out-of-state commerce. Michigan may regulate wine sales, and it may

regulate intensively, even to the point of prohibition. But it may not discriminate. This Court's cases have long made clear that "the greater power to forbid imports does not imply a lesser power to allow imports on discriminatory terms." *Bridenbaugh*, 227 F.3d at 853 (Easterbrook, J.) (summarizing cases). As this Court said in rejecting a Twenty-First Amendment defense of a discriminatory state tax on alcoholic beverage imports, "[d]oubts about the scope of the Amendment's authorization notwithstanding, one thing is certain: The central purpose of the provision was not to empower States to favor local liquor industries by erecting barriers to competition." *Bacchus Imports*, 468 U.S. at 276.

For the same reasons, the Webb-Kenyon Act, 27 U.S.C. § 122, first enacted in 1913 and re-enacted in 1935 after the repeal of Prohibition, provides no affirmative authority from Congress for state discrimination against out-of-state wine shipments. That Act merely mirrors the language of section two of the Twenty-First Amendment, and no more authorizes discrimination against out-of-state wine shipments than does the Amendment itself. Indeed, this Court already has construed the Act narrowly, as only prohibiting shipments into dry areas; it thus cannot be read as authorizing States to discriminate against out-of-state sellers in favor of local interests. *See, e.g.*, *Seaboard Air Line Ry. v. North Carolina*, 245 U.S. 298, 303 (1917).

Under the appropriately exacting scrutiny these constitutional principles require, Michigan's discriminatory wine shipment laws must fall. Even granting the strength of the State's interests in preventing access by minors, regulating the distribution of wine, and collecting taxes, those interests can readily be served by nondiscriminatory alternatives, such as the evenhanded direct shipment bills already enacted by a growing majority of Michigan's sister States.

## ARGUMENT

### I. MICHIGAN'S DISCRIMINATION AGAINST OUT-OF-STATE WINE PRODUCERS VIOLATES THE DORMANT COMMERCE CLAUSE.

It is undisputed that Michigan's wine shipment law discriminates explicitly against out-of-state commerce. Michigan provides that in-state wineries may sell and ship their wine directly to consumers, but out-of-state wineries may not. No matter how law-abiding the Virginia, California, Arizona (or other out-of-state) winery may be, and no matter how spotless its record of scrupulous compliance with State and federal law, Michigan says no. That winery simply may not sell its products directly to consumers, but rather must sell its products only through state-licensed wholesalers (who have, not surprisingly, intervened in this litigation and attempted to defend this discriminatory system). But while saying no to out-of-state wineries, Michigan says a hearty yes to the approximately 40 wineries now dotting the Michigan landscape.

There can be no doubt that this amounts to textbook discrimination within the meaning of the dormant commerce clause, namely "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994). Because such discrimination against an out-of-state product violates the core principle of our national economic union, it faces a "virtually *per se* rule of invalidity," *Philadelphia*, 437 U.S. at 624. This is so even though wine rather than garbage or milk is the product at issue.

### A. The Principle of Nondiscrimination Against Interstate Commerce Lies at the Core of the National Economic Union.

Since Justice Johnson's concurring opinion in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), this Court has been steadfast in protecting a fundamental proposition of national economic union: The Commerce Clause, by its own force, prohibits state-imposed discrimination against interstate commerce.[4] *See id.* at 231 ("If there was any one object riding over every other in the adoption of the Constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints."). All Justices now sitting on this Court have embraced this proposition. *See, e.g., S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 169 (1999) (Breyer, J., for a unanimous Court); *Assoc. Indus. of Mo. v. Lohman*, 511 U.S. 641, 646 (1994) (Thomas, J., for a unanimous Court). Eight of the now-sitting Justices have authored opinions for the Court embracing it.[5] An entire body of decades-old law has grown up explicating and applying the principle. The principle is simple and easy of application: States are not to discriminate against interstate commerce. To do so is presumptively wrong and

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[5] *See, e.g., D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 29-30 (1988) (Rehnquist, C.J.); *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 192-93 (1994) (Stevens, J.); *New Energy Co. v. Limbach*, 486 U.S. 269, 273-74 (1988) (Scalia, J.); *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 393 (1994) (Kennedy, J.); *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330-31 (1996) (Souter, J.); *Assoc. Indus. of Mo. v. Lohman*, 511 U.S. 641, 646 (1994) (Thomas, J.); *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 311 (1994) (Ginsburg, J.); *S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 169 (1999) (Breyer, J.). *See also C & A Carbone*, 511 U.S. at 402 (O'Connor, J. concurring in the judgment) ("Where ... a regulation 'affirmatively' or 'clearly' discriminates against interstate commerce on its face or in practical effect, it violates the Constitution unless the discrimination is demonstrably justified by a valid factor unrelated to protectionism.").

unconstitutional.[6]

The nondiscrimination principle abundantly found in this Court's jurisprudence is firmly grounded in the structure of our national economic union. In no small part, the Founding itself—expressly aimed to form a more perfect union—was animated by the need to quash parochial jealousies embodied in trade barriers betraying the Framers' vision of a vast commercial market. "The Framers granted Congress plenary authority over interstate commerce in 'the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.'" *Oregon Waste Sys.*, 511 U.S. at 98 (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325-36 (1979)). As Justice Jackson observed on behalf of the Court:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

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[6] Although several Justices have critiqued aspects of the Court's dormant Commerce Clause jurisprudence with respect to balancing even-handed state regulations against the burden they place on interstate commerce, *see e.g.*, *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 609-20 (1997) (Thomas, J., dissenting); *West Lynn Creamery*, 512 U.S. at 210-12 (Scalia, J., concurring in the judgment), none have suggested abandoning the nondiscrimination principle.

*H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949).

It was "[t]he 'negative' aspect of the Commerce Clause"—the presumptive prohibition of discriminatory and partial legislation—that James Madison and the Founders recognized to be "the more important" towards the creation of a national market. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 n.9 (1994).[7] "[T]he peoples of the several states must sink or swim" together, as Justice Cardozo taught in a passage often quoted by this Court. *Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 523 (1935). Therefore, "[i]f a restriction on commerce is discriminatory, it is virtually *per se* invalid." *Oregon Waste Sys.*, 511 U.S. at 99.

The cases are legion. For example, New York dairy farmers have been instructed that our national economic union requires competition with more efficient Vermont dairies, even when the putative justification for discrimination is public health. *See Baldwin*, 294 U.S. at 523. Oklahoma wildlife officials have learned that they may not conserve the local minnow population by closing their rivers to fishermen who would sell their catch out of the State. *See Hughes*, 441 U.S. at 337. And, North Carolina apple growers have been told that they may not avoid competition with Washington growers through a state law prohibiting those growers from advertising their higher out-of-state standards, even when the law purportedly is necessary to prevent consumer confusion. *See Hunt v. Wash.*

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[7] As Madison explained, the Commerce Clause "grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government." 3 M. Farrand, *Records of the Federal Convention of 1787*, at 478 (1911). *See also Federalist* No. 22, at 143-45 (A. Hamilton) (Clinton Rossiter ed., 1961); James Madison, *Vices of the Political System of the United States*, in 2 *Writings of James Madison* 362-63 (G. Hunt ed., 1901).

*State Apple Adver. Comm'n*, 432 U.S. 333, 351 (1977).

This nondiscrimination principle enjoys such force in the Court's jurisprudence that New Jersey was told that it must accept Philadelphia's garbage, *Philadelphia*, 437 U.S. 617, Alabama was told that it must accept hazardous wastes from around the country, *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334 (1992), Oregon was told it must not impose a surcharge on out-of-state garbage, *Oregon Waste Sys.*, 511 U.S. 93, and Clarkstown, New York was told it could not require all garbage to be processed through its home-grown plant rather than processed out of state, *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383 (1994). From these cases, it cannot reasonably be questioned that Michigan must treat in-state and out-of-state commerce the same.

### B. The Nondiscrimination Principle Applies in Full Force to the Sale of Alcohol.

This Court has made clear that the same nondiscrimination principle applies with force to the sale of alcoholic products. In *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 273, 275-76 (1984), the Court held that the Commerce Clause prohibited Hawaii from exempting the makers of local pineapple wine and a local brandy from a tax applied generally to all liquor imported from out of the State. The Court reiterated that "[o]ne of the fundamental purposes" of the Commerce Clause "was to insure against discriminating State legislation." *Id.* at 271 (internal quotation omitted). This Court reaffirmed that "[i]t has long been the law that States may not 'build up [their] domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States." *Id.* at 272 (quoting *Guy v. Baltimore*, 100 U.S. 434, 443 (1880)). Whatever the motives of the state legislature, the tax discriminated against out-of-state producers in favor of local producers, and the tax therefore violated a "cardinal rule of Commerce Clause jurisprudence." *Id.* at 268. The Constitution simply does not

tolerate any efforts by the State to discriminate between the products of in-state and out-of-state sellers, even of alcoholic beverages.

This Court's holding in *Bacchus* confirms that the nondiscrimination principle is deeply rooted in the constitutional fabric of the union, and admits of no exception for alcoholic beverages. "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests," the Court has "generally struck down the statute without further inquiry." *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986) (applying strict scrutiny to a state regulation that sought to regulate beer prices outside the territory of the State). In *Healy v. Beer Institute, Inc.*, 491 U.S. 324 (1989), for example, the Court applied the nondiscrimination principle to invalidate a statute regulating the importation of beer by requiring out-of-state beer shippers, but not in-state shippers, to affirm that their prices in Connecticut were no higher than in surrounding states. *See id.* at 340-41; *see also id.* at 344 (Scalia, J., concurring in the judgment). The national economic union does not permit Michigan to carve out a market for its local wineries in which they may operate free from competition with those out of state, any more than it entitled Connecticut to protect its own beer shippers against price competition. The court of appeals' decision did nothing more than faithfully apply this well-established rule to invalidate Michigan's discriminatory ban on direct shipping.

### C. Michigan's Shipment Law Violates the Nondiscrimination Principle.

Michigan's wine shipment rule discriminates against out-of-state wineries in several respects. In contrast to in-state wineries, an out-of-state winery must find a wholesaler willing to distribute its wine or else be totally excluded from

the market. *See* FTC Report at 23-25; C.A. App. 88-90 (Siegl Aff. ¶ 2). And because out-of-state wineries may only sell their wine through a separate wholesaler and retailer, both of which mark up the price, their wine is relatively more expensive to consumers. C.A. App. 239-40 (Bridenbaugh Aff. ¶¶ 15-16). State laws that raise the price of out-of-state goods in relation to in-state products are "paradigmatic examples" of discrimination against interstate commerce. *West Lynn Creamery*, 512 U.S. at 193. By allowing only in-state wineries to direct ship, Michigan gives its in-state wineries a competitive advantage over out-of-state wineries—a residents-only express lane that enables in-state wineries to bypass the wholesaler's toll booth. In addition, the ban on interstate direct shipment gives in-state businesses a monopoly on serving customers who want home delivery. This is a significant commercial advantage in Michigan, which has many areas (*e.g.*, the Upper Peninsula) that are far from the nearest well-stocked wine store.

Michigan asserts that the State did not enact the wine shipment rule with the intent to engage in economic protectionism, so the rule should not be characterized as impermissibly discriminatory. 03-1116 Br. 29; 03-1120 Br. 31. Similar arguments have been rejected by this Court many times. A "pure motive" is not a defense, and "a court need not inquire into the purpose or motivation behind a law to determine that in fact it impermissibly discriminates against interstate commerce." *Assoc. Indus. of Mo. v. Lohman*, 511 U.S. 641, 653-54 (1994); *see also Oregon Waste Sys.*, 511 U.S. at 100 ("the purpose of, or justification for, a law has no bearing on whether it is facially discriminatory").

## II. THE TWENTY-FIRST AMENDMENT DOES NOT IMMUNIZE MICHIGAN'S DISCRIMINATION AGAINST OUT-OF-STATE WINE PRODUCERS.

Faced with a statute that blatantly discriminates against

out-of-state wineries in violation of the Commerce Clause, Michigan and the in-state wholesalers who benefit from its protectionism summon forth the Twenty-First Amendment, asserting that a State has utterly unrestricted authority when it "exercises its core power to regulate the importation of alcohol for use in the State." 03-1120 Br. 30. But the Twenty-First Amendment is not nearly as powerful as Michigan and the wholesalers would have it. Indeed, elsewhere in their briefs, Michigan and its partisans concede, as they must, that the Twenty-First Amendment does not "immunize" Michigan "from other provisions of the Constitution," or from federal legislation under the affirmative authority of the Commerce Clause. *See* 03-1116 Br. 17-18, 31-32; 03-1120 Br. 15, 27-29. It follows inexorably from this concession, and from the text, history and jurisprudence of the Twenty-First Amendment, that the Amendment likewise provides no shield from the Commerce Clause's nondiscrimination principle.

### A. The Twenty-First Amendment Does Not Displace Other, Pre-Existing Constitutional Provisions.

If the terms of section 2 were as powerful as Michigan and the wholesalers claim, then the Twenty-First Amendment would save state liquor regulations from violating all other constitutional provisions. Indeed, a State could rely upon section 2 to bar the importation of wine produced by African-American-owned wineries, but allow importation of wine produced by white-owned ones. That cannot be so. Indeed, no one would contend that such a flagrant equal protection violation would somehow be rendered constitutional by virtue of the later-ratified Twenty-First Amendment. Just as the First Amendment's seemingly absolute proscription, "Congress shall make no law ... abridging the freedom of speech," does not preclude reasonable time, place and manner regulations, so too the Twenty-First Amendment

does not provide the all-encompassing power that would be suggested by the literal terms of section 2.

To the contrary, the Twenty-First Amendment is to be understood as a part of the whole Constitution, and a proper understanding of its terms requires an analysis of where that narrowly focused amendment falls in our constitutional structure. As this Court has recognized with respect to the Commerce Clause (and the same could be said for the other provisions of the Constitution as well):

> Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.

*Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964). Ordinary rules of constitutional interpretation are not suspended with respect to the Twenty-First Amendment. The judicial task remains to afford the language of section 2 a reasonable construction in harmony with the rest of the founding document.

Accordingly, this Court has consistently rejected States' attempts to use the Twenty-First Amendment to wash away their constitutional sins. For example, the Twenty-First Amendment has been held not to create a zone where free speech principles are suspended. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996) (invalidating a state regulation of alcohol price advertising). Nor does the Amendment permit violations of the Equal Protection Clause. *See Craig v. Boren*, 429 U.S. 190, 204-09 (1976) (invalidating a state regulation discriminating on the basis of gender in setting the legal age for purchase of beer). Even a state regulation imposing a tax on liquor imported from abroad, a regulation falling squarely within the terms of the Twenty-First Amendment, has been held to fall under the prohibition of the Export-Import Clause. *See Department of*

*Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 345-46 (1964). Such cases illustrate that the text of the Twenty-First Amendment is not to be read as erasing all preceding constitutional text. After all, the First Amendment upheld in *44 Liquormart* preceded the Twenty-First Amendment's ratification by 140 years, and the Fourteenth Amendment vindicated in *Craig* by 70 years.

Nor does the Twenty-First Amendment shield state regulation from Congress's affirmative exercise of power under the Commerce Clause. Alcoholic beverage industries are governed by federal legislation enacted under Congress's affirmative Commerce Clause power, such as the Sherman Act, even though that charter of free enterprise is not embedded in a constitutional amendment and long preceded the Twenty-First Amendment. *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 711-16 (1984); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106-14 (1980). Indeed, if the Twenty-First Amendment conferred such expansive plenary power on the States as Michigan contends, then a vast array of federal regulations of alcoholic beverages could be trumped by state laws, turning the ordinary operation of the Supremacy Clause on its head. This is not and has never been the law.

### B. The Twenty-First Amendment Does Not Displace the Nondiscrimination Principle of the Dormant Commerce Clause.

Michigan and the wholesalers nonetheless contend that even if other constitutional provisions restrict aspects of the state regulation of alcohol, the Commerce Clause does not restrict *in any way* a State's Twenty-First Amendment power to regulate the importation and sale of alcohol. *See* 03-1120 Br. 24 (claiming the power to regulate importation is absolutely unlimited by the Commerce Clause); *see also* 03-1116 Br. 31. This statement proves too much, since there can be no doubt of Congress's *affirmative* authority under the

Commerce Clause to pass the vast array of federal laws that now exist governing interstate commerce in alcohol. *See Hostetter*, 377 U.S. at 332 (rejecting the proposition that the Twenty-First Amendment overrode Congress' Commerce Clause power as "patently bizarre and ... demonstrably incorrect").

Even if understood as limited to the *negative* implications of the Commerce Clause, however, Michigan's statement is belied by the history and jurisprudence of the Twenty-First Amendment as it meets *discriminatory* state liquor legislation. It is common ground that a State enjoys broad power to regulate the importation and sale of liquor within its borders. *See, e.g., California Retail Liquor Dealers Ass'n*, 445 U.S. at 110; *North Dakota v. United States*, 495 U.S. 423, 432 (1990). But this Court has never held that such power is unlimited, even with respect to regulating importation. Both the history of the Amendment's passage and this Court's case law make clear that a State is forbidden from discriminating against interstate commerce in alcohol as much after the Twenty-First Amendment as before it.

1. The Enactment of the Twenty-First Amendment Did Not Undermine The Nondiscrimination Principle.

The Twenty-First Amendment ended Prohibition, and its section 2 granted States authority to regulate and thus burden interstate commerce in a way that would otherwise run afoul of the Commerce Clause. Section 2 entitles a dry State or a State with dry counties, for example, to exclude liquor at its borders in order to reinforce a ban on sale or consumption within the State. But the Twenty-First Amendment does *not* allow States to violate the fundamental principle of national economic union by explicitly discriminating against alcohol producers situated out of state. The touchstone of the authority granted the States over alcohol by the Twenty-First Amendment is evenhandedness toward those in and out of

state. "[T]he greater power to forbid imports does not imply a lesser power to allow imports on discriminatory terms." *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 853 (7th Cir. 2000) (Easterbrook, J.).

The continuity of the nondiscrimination principle is clear from the history of the rise and fall of Prohibition. Before the Civil War, the Court held that States had essentially plenary power to regulate the production and trade of alcoholic beverages within their borders. *See License Cases*, 46 U.S. (5 How.) 504, 577 (1847) (Taney, C.J.). In the late nineteenth century, however, as an increasing number of States became "dry," the Court, applying its then-prevailing view of the dormant Commerce Clause, began to whittle away at that power. Thus, while the Court continued to allow States to prohibit the production and consumption of alcohol within their borders, *see Mugler v. Kansas*, 123 U.S. 623, 661-63 (1887), the Court also held that States could not restrict the importation of liquor to persons possessing a permit, *see Bowman v. Chicago & Northwestern Ry.*, 125 U.S. 465, 499-500 (1888), and then held that States could not regulate the importation or resale of alcohol as long as the alcohol remained in its original package, *see Leisy v. Hardin*, 135 U.S. 100, 108-10 (1890).

The effect of these decisions was that States could regulate alcohol produced by in-state persons, but not alcohol imported into the State from out-of-state persons, rendering state dry laws unenforceable as a practical matter. In order to eliminate this problem, Congress enacted the Wilson Act, which authorized States to regulate imported alcohol "to the same extent and in the same manner" as non-imported alcohol. 26 Stat. 313 (1890). The Wilson Act did not accomplish its purpose, however, because this Court construed the measure narrowly as empowering States to regulate only the *resale* of imported alcohol in its original package, not the direct *shipment* of alcohol to consumers. *See Rhodes v. Iowa*, 170 U.S. 412, 423 (1898); *Vance v. W.A.*

*Vandercook Co.*, 170 U.S. 438, 446 (1898). Again seeking to eliminate the *Bowman/Rhodes* loophole by which out-of-state producers had an advantage over in-state producers and could help in-state parties circumvent state alcohol law, Congress passed the Webb-Kenyon Act, which states, in relevant part, that "[t]he shipment or transportation ... of ... intoxicating liquor of any kind from one State, Territory, or District of the United States into any State, Territory or District of the United States ... to be received, possessed, sold, or in any manner used ... in violation of any law of such State, Territory, or District ... is prohibited." 37 Stat. 699 (1913), now codified at 27 U.S.C. § 122. The Webb-Kenyon Act thus granted States the power to remain "dry" by regulating imported alcohol just as they regulated alcohol produced or sold inside the State.

Prior to Webb-Kenyon, the Court had also held that the Commerce Clause prohibited States from discriminating against out-of-state products. *See Walling v. Michigan*, 116 U.S. 446, 460 (1886). Webb-Kenyon was addressed only to the *Bowman/Rhodes* line of cases, and did not affect the rule against discrimination (although it would have been easy for Congress to do so). Therefore, the statute did not authorize discrimination against alcohol brought into one State from another. *See Pacific Fruit & Produce Co. v Martin,* 16 F. Supp. 34, 39-40 (W. D. Wash. 1936).[8]

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[8] A review of state statutes extant at the time of Webb-Kenyon's passage likewise reveals no origin-based discrimination. Most regulation was aimed at morality by, for example, prohibiting sales to certain enumerated categories of persons, including "drunkards" and "Indians," and prohibiting card-playing and female musicians in saloons. *See e.g.*, N.M. Stat. Ann. § 2926 (1915); S.D. Rev. Code § 2856 *et seq.* (1903). Otherwise, alcohol regulation was largely a matter of local, rather than statewide, control. Although a few States had statewide prohibition, *see e.g.*, N.C. Rev. L. § 2058 (1908); Ann. Code. Ga. § 1770nn (1907), the majority of state regulations involving prohibition allowed localities the option of prohibiting alcohol. *See e.g.*, Mass. Rev. L. ch. 100 §§ 13, 48 (1902); S.D. Rev. Code § 2856 (1903); Gen. Code Ohio §§ 6097, 6108 *et*

In 1919, the Eighteenth Amendment was ratified, and t "Noble Experiment" began. *See, e.g.*, William Leuchtenburg, *The Perils of Prosperity 1914-1932*, at 212- (2d ed. 1993). That experiment came to an end 14 years lat with the Twenty-First Amendment's ratification. Section repealed the Eighteenth Amendment, and thereby end nationwide Prohibition. For its part, the lesser-know section 2 "closely follows the Webb-Kenyon and Wilso Acts, expressing the framers' clear intention constitutionalizing the Commerce Clause framewo established under those statutes." *Craig v. Boren*, 429 U. 190, 205-06 (1976); *see also* 76 Cong. Rec. 4172 (193 (section 2 effectively "incorporate[d] [the Webb-Kenyo Act] permanently in the Constitution") (statement of Se Borah). Section 2, whose language tracks that of the Webb Kenyon Act almost exactly, was designed to put to rest an lingering doubts about the Webb-Kenyon Act's ow constitutionality. *See* 76 Cong. Rec. 4170 (1933) (statemen of Sen. Borah).

Despite Michigan and its wholesalers' efforts to portra isolated statements in the debates as evidencing State absolute power over all alcohol importation, *see* 03-1116 B 19-20; 03-1120 Br. 21-23, nothing in the legislative ratification history of the Twenty-First Amendment or th Webb-Kenyon Act in fact indicates that section 2 wa intended to allow States *to discriminate* in favor of in-stat

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*seq.* (1910); N.M. Stat. Ann. § 2927 (1915); Ann. Consol. Laws of N.Y §§ 13, 23 (1917); Mo. Stat. Ann. § 3027 *et seq.*; Pierce's Wash. Cod § 5713 (1905). Few States, including those with statewide prohibition, ha any regulations regarding the shipment of alcohol, but those that di prohibited shipping to localities that opted to be dry. Those laws did no distinguish between in-state and out-of-state shippers. *See e.g.*, Ky. Sta §§ 2554, 2557a, 2569a (Carroll 1915); Ann. Consol. Laws of N.Y. §§ 13 23 (1917).

producers.[9] To the contrary, the entire history of legislative efforts in this area is one of ensuring *evenhanded* regulation of in-state and out-of-state producers in order to effectuate local prohibition and to eliminate the rather odd discrimination against in-state producers that had prevailed as a result of this Court's earlier interpretation of the dormant Commerce Clause.

In a series of short opinions in the period following ratification of the Twenty-First Amendment, this Court suggested that the power of States to regulate under section 2 was quite generous. *See, e.g., State Bd. of Equalization v. Young's Mkt. Co.*, 299 U.S. 59, 62-64 (1936); *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401, 403-04 (1938); *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391, 394 (1939); *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138-39 (1939). But despite some broad statements to the effect that a State's power under section 2 is "unfettered by the Commerce Clause," *Ziffrin*, 308 U.S. at 138, even those early cases do not support Michigan and the wholesalers' assertion that section 2 trumps the nondiscrimination principle. *See* 03-1116 Br. 21-22; 03-1120 Br. 24-27.

In *Young's Market*—the case on which all of this Court's other early cases rest and upon which Michigan and the wholesalers rely so heavily—this Court considered a constitutional challenge by wholesalers to California's post-

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[9] The core concern of the legislative drafters of section 2 of the Twenty-First Amendment was "to assure the so-called dry States against the importation of intoxicating liquor into those States." 76 Cong. Rec. 4141 (1933) (statement of Sen. Blaine); *see also id.* at 4518 ("Section 2 attempts to protect dry States.") (statement of Rep. Robinson). The core concern of the state ratifying conventions was temperance, and the only state convention delegate to make a recorded comment on shipment repeated what the drafters had said: "All those who traffic in liquor across state lines *which have dry laws* may and will be prosecuted." *Ratification of the Twenty-First Amendment to the Constitution of the United States* 104 (Everett S. Brown ed., 1938) (reprinted 1970) (statement of Mr. Wilson).

Prohibition regulatory scheme, under which wholesaler were required to pay $50 for a wholesaler's license in orde to distribute beer, and importers were required to pay a additional $500 in order to import beer into the State. 29 U.S. at 60-61. At the very beginning of its analysis, th Court squarely rejected the contention that this scheme wa discriminatory and thereby violated the dormant Commerc Clause. *See id.* at 61-62. The Court reasoned that, while th scheme may have imposed a burden on interstate commerce "there is no discrimination against [plaintiffs] qu wholesalers," since wholesalers paid the same fee to sel either imported or domestic beer. *Id.* at 61. The Cour therefore concluded that "the case does not present a questio of discrimination prohibited by the commerce clause." *Id.* a 62. Insofar as subsequent cases (and the wholesalers characterized *Young's Market* as affirmatively holding tha "discrimination against imported liquor is permissible," *e.g. Mahoney*, 304 U.S. at 403, that characterization does no comport with the decision's express understanding of th state regulation in question as nondiscriminatory.[10]

To the extent language in the Court's early Twenty-Firs Amendment cases suggested that state power under section 2 was effectively unlimited, *see, e.g.*, *Mahoney*, 304 U.S. a 403-04 (rejecting Equal Protection challenge to state liquo regulation), this Court has long since distanced itself from such a sweeping view. The Court has expressly stated tha section 2 does not give States unfettered power to regulate

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[10] The wholesalers incorrectly assert that *Young's Market* affirmed a discriminatory law that "imposed a $500 license fee for wholesalers to import beer [but] imposed no analogous fee for locally produced beer." 03-1120 Br. 25. The Court noted that California did in fact impose an analogous fee of $750 for the privilege of producing beer locally. 299 U.S. at 64. They similarly mischaracterize *Indianapolis Brewing Co.* as affirming a discriminatory statute, 03-1120 Br. 26, but again the law at issue was actually characterized by the Court as nondiscriminatory in nature. 305 U.S. at 392, 394.

interstate commerce in liquor. *See, e.g.*, *Bacchus*, 468 U.S. at 275. Thus, in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964) (invalidating a State's effort to terminate duty-free sales of alcohol to departing international airline travelers), the Court conceded that "in the early years following adoption of the Twenty-first Amendment," it had suggested that a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders," *id.* at 330, but promptly added that "[t]o draw a conclusion from this line of decisions that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would ... be an absurd oversimplification." *Id.* at 331-32.

2. This Court Has Applied The Nondiscrimination Principle To Strike Down State Regulations Of Alcohol Importation.

The Twenty-First Amendment no more operates to repeal the negative implications of the Commerce Clause than it does to eliminate Congress's affirmative authority to regulate interstate alcohol shipments. In three key cases, this Court has decisively rejected any claim that the Twenty-First Amendment immunizes from strict dormant Commerce Clause scrutiny those state liquor laws that discriminate against or directly regulate interstate commerce. *See Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986); *and Healy v. Beer Inst., Inc.*, 491 U.S. 324 (1989). In each case, the Court applied the nondiscrimination principle to strike down state regulations that fell squarely within the plain language of the Twenty-First Amendment by covering the importation of alcohol.

*Bacchus* stands in the way of Michigan's vision. As noted

above, *Bacchus* considered the validity of a Hawaii statute that provided a tax exemption for certain locally produced alcoholic beverages. After concluding that this discriminatory exemption violated a "cardinal rule of Commerce Clause jurisprudence," 468 U.S. at 268, the Court then considered whether the provision could be "saved" by the Twenty-First Amendment, *see id.* at 274-76. The Court acknowledged *Young's Market* and other early cases, but it refused to extend the "broad language" in those cases and noted instead that "[i]t is by now clear that the Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause." *Id.* at 275. The Court determined that "[t]he question in this case is thus whether the principles underlying the Twenty-first Amendment are sufficiently implicated by the exemption ... to outweigh the Commerce Clause principles that would otherwise be offended." *Id.*

Applying that approach, the Court concluded that the Twenty-First Amendment would not save the discriminatory state law. *See id.* at 276. The Court reasoned that it was "certain" that "[t]he central purpose of the [Twenty-First Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition." *Id.* It was "also beyond doubt that the Commerce Clause itself further strong federal interests in preventing economic Balkanization." *Id.* Therefore, the Court refused to afford the "same deference" to "[s]tate laws that constitute mere economic protectionism" that it would to those "enacted to combat the perceived evils of an unrestricted traffic in liquor." *Id.* Hawaii simply could not rely upon the Twenty-First Amendment to justify an otherwise discriminatory law. *See id.*

To be sure, not everyone on the Court at the time agreed with *Bacchus*. But since Justice White's opinion for a clear majority of the Court was handed down, every Justice in dissent in *Bacchus* has since relied upon that case for the

nondiscrimination principle. Not a single opinion by any Justice has called *Bacchus* into question. As Justice Scalia explained, *Bacchus* stands for the established proposition that a state statute's "discriminatory character eliminates the immunity afforded by the Twenty-first Amendment." *Healy*, 491 U.S. at 344 (Scalia, J., concurring) (*citing Bacchus*, 468 U.S. at 275-76). In short, the baseline since *Bacchus* is nondiscrimination.

Michigan and its wholesaler allies struggle to distinguish *Bacchus*, arguing that the Hawaiian tax regulation did not involve a regulation of "the transportation or importation into any State" of alcoholic beverages covered by the language of section 2. *See* 03-1116 Br. 29; 03-1120 Br. 30-31. Accordingly, the wholesalers argue, *Bacchus* "did not even hint that rational distinctions ... drawn in the course of regulating physical importation may be subject to heightened scrutiny." 03-1120 Br. at 31. To the contrary, however, the Hawaiian regime expressly imposed a tax on all liquors *imported into Hawaii for use therein* that it did not impose on locally produced liquors. A tax on liquor imports is obviously a regulation of the "importation" of liquor into the State. *See Bacchus*, 468 U.S. at 282 (Stevens, J., dissenting).

Nor can the wholesalers find succor in Judge Easterbrook's assertion that "'[n]o decision of the Supreme Court holds or implies that laws limited to the importation of liquor are problematic under the dormant commerce clause.'" 03-1120 Br. 31 (quoting *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 853 (7th Cir. 2000)). The Twenty-First Amendment certainly confers authority on the State to burden commerce in liquor in a way that it may not burden commerce in other products, *e.g.*, by imposing a licensing fee on imports, *compare Young's Market*, 299 U.S. 59 (1936) (upholding licensing fee), *with Bowman v. Chicago & Northwestern Ry.*, 125 U.S. 465 (1888) (striking down permit requirement). But as Judge Easterbrook recognized in the very next sentence (which the wholesalers ignore): "[w]hat

the Court *has* held, however, is that the greater power to forbid imports does not imply a lesser power to allow imports on discriminatory terms." *Bridenbaugh*, 227 F.3d at 853 (*citing Brown-Forman*, 476 U.S. at 579). "Cases such as *Brown-Forman* and *Bacchus* ... treat § 2 as eliminating economic discrimination against in-state commerce of the sort caused by *Leisy*, *Bowman*, and the original package doctrine, *without authorizing discrimination* against out-of-state sellers." *Id.* (emphasis added); *see also Beskind v. Easley*, 325 F.3d 506, 515 (4th Cir. 2003) (Neimeyer, J., joined by Luttig and Traxler, JJ.) ("Because North Carolina's ABC laws discriminate against out-of-state wine manufacturers and shippers in favor of in-state wine manufacturers and shippers, the scheme violates 'a central tenet of the Commerce Clause.'") (quoting *Bacchus*, 468 U.S. at 276).

Michigan therefore cannot rely on section 2's guarantee of authority to regulate the importation and distribution of liquor. *See, e.g.*, 03-1116 Br. 14. Even if section 2 gives the State broad power "over the importation and sale of liquor and the structure of the liquor distribution system," *North Dakota v. United States*, 495 U.S. 423, 431 (1990) (plurality opinion), this does not support the quite different proposition that section 2 trumps the nondiscrimination principle, *see Bacchus*, 468 U.S. at 275-276. And so it is that Michigan seeks to overrule *Bacchus*, dismissing it as "wrongly decided insofar as the 21st Amendment is concerned," 03-1116 Br. 28, or that the wholesalers are forced to admit that *Bacchus* is "arguably inconsistent" with their painstaking interpretation of this Court's Twenty-First Amendment jurisprudence, 03-1120 Br. 30.

*Bacchus* is not so easily dismissed. To the contrary, it is embedded in a series of decisions addressing the interplay between the dormant Commerce Clause and the Twenty-First Amendment. In each, the Court has specifically rejected the idea that section 2 repeals any "central tenet" of the

Commerce Clause. In addition to *Bacchus*, the Court applied similar reasoning in two other cases refusing to "save" state legislation under the Twenty-First Amendment. *See Brown-Forman*, 476 U.S. 573; *Healy*, 491 U.S. 324. In both cases, the Court considered the constitutionality of price-affirmation statutes, which essentially set a maximum price for alcohol sold in the State by requiring producers to affirm that they were selling their products at a price no higher than the lowest price elsewhere in the country. *See Brown-Forman*, 476 U.S. at 576; *Healy*, 491 U.S. at 328.

In *Brown-Forman*, the Court held that a "prospective" price-affirmation statute violated the dormant Commerce Clause because "[f]orcing a merchant to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate commerce." 476 U.S. at 582. The Court reaffirmed the controlling principle: "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry." *Id.* at 579. It reiterated that "the Twenty-first Amendment did not entirely remove state regulation of alcohol from the reach of the Commerce Clause," *id.* at 584 (*citing Bacchus*), and reasoned that the statute could not be "saved" because the Twenty-First Amendment gave States no authority to control sales in other States. *See id.* at 584-85.

In *Healy*, the Court held that a "contemporaneous" price-affirmation statute was invalid under the dormant Commerce Clause, not only because the statute impermissibly affected prices in other States but also because the statute discriminated against alcohol producers and shippers engaged in interstate commerce because it did not apply to in-state shippers. 491 U.S. at 335-41. Following *Brown-Forman*, the Court reasoned that the statute could not be "saved" because the Twenty-First Amendment conferred no authority on States to regulate extraterritorially. *See id.* at

341-42. In an opinion concurring in the judgment, Justice Scalia, citing *Bacchus*, concluded that "[the law's] discriminatory character eliminates the immunity afforded by the Twenty-first Amendment." *Id.* at 344.

Michigan and the wholesalers seek to dismiss these cases, as they dismissed *Bacchus*, by arguing that these cases were not "covered by the Twenty-First Amendment." 03-1120 Br. 30; *see also* 03-1116 Br. 30. The wholesalers further suggest that "the discrimination at issue was entirely different from that at issue" here, because the State's pricing law applied only to sellers doing business in Connecticut and another State. They argue that the pricing law did not implicate the Twenty-First Amendment as it had "nothing to do with importation" or even interstate commerce. 03-1120 Br. 29-30 n.15. This is plainly incorrect. In each of these cases, the Court discussed the Twenty-First Amendment at length and flatly rejected it as a defense.

Moreover, in those cases, the statutes at issue clearly *did* concern the importation of liquor into the State. As Michigan recognizes, *see* 03-1116 Br. 30, the Court concluded in *Brown-Forman* and *Healy* that each statute controlled sales in other States, and thus lay outside the scope of the State's authority. But both price-affirmation laws also regulated the price of *imported* beer. Regulation of the price of imported alcohol falls squarely within the express language of the Twenty-First Amendment, and in both *Brown-Forman* and *Healy*, the Court explicitly rejected the argument that these liquor regulations were immunized by the Twenty-First Amendment.

## III. CONGRESS HAS NOT AFFIRMATIVELY AUTHORIZED DISCRIMINATORY STATE REGULATION OF LIQUOR IMPORTS THROUGH THE WEBB-KENYON ACT.

Michigan and the wholesalers argue that, even if Michigan's wine shipment law is discriminatory, it does not

violate the dormant Commerce Clause because Congress has exercised its affirmative Commerce Clause power in the Webb-Kenyon Act so as to authorize the States to enact discriminatory liquor regulations. *See* 03-1116 Br. 36-38; 03-1120 Br. 16-17. This argument is without merit. While Congress certainly may confer upon the States the power to discriminate against interstate commerce, it has not done so here.

To begin with, the Webb-Kenyon Act does no more than mirror the language of section 2 of the Twenty-First Amendment. Webb-Kenyon was effectively incorporated into the Constitution by the almost identically worded section 2 of the Twenty-First Amendment. *See Craig v. Boren*, 429 U.S. 190, 205-06 (1976); 03-1116 Br. 38 (recognizing same), It thus can no more operate as a delegation of authority to discriminate than can section 2, *see Bainbridge v. Turner*, 311 F.3d 1104, 1110-11 (11th Cir. 2002), and as discussed above, this Court has repeatedly recognized that the Amendment in no way "repealed" the dormant Commerce Clause.

Michigan points to the phrase "any law" (which is also found in section 2), and argues that this must mean that "any" liquor regulation is immune from scrutiny, regardless of whether it discriminates against interstate commerce. But the argument that the statute amounts to an unlimited delegation has no more purchase here than under section 2 of the Twenty-First Amendment. *See* Section II.A., *supra*. This Court has made clear that those words do *not* immunize State liquor regulations from Commerce Clause scrutiny when used in the Twenty-First Amendment. *See Bacchus*, 468 at 275. There is therefore no reason why those same words, which say nothing at all about discrimination, would have more force when encoded in an act of Congress.

Because congressional authorization of state discrimination against interstate commerce runs contrary to the federal interest in a national economic union, Congress's

intent must be clearly and unambiguously expressed. *See Hillside Dairy, Inc. v. Lyons*, 539 U.S. 59, 66 (2003); *New York v. United States*, 505 U.S. 144, 171 (1992); *Wyoming v. Oklahoma*, 502 U.S. 437, 458 (1992).[11] Webb-Kenyon expresses no such clear intent. To the contrary, the text of the Webb-Kenyon Act, like that of the Twenty-First Amendment, says absolutely nothing about discrimination, and thus cannot be construed as authorizing Michigan to discriminate against out-of-state wine.

In any event, this Court has held that the "only purpose [of the Webb-Kenyon Act] was to give effect to state prohibitions." *James Clark Distilling Co. v. Western Md. Ry. Co.*, 242 U.S. 311, 322 (1917); *see also McCormick & Co. v. Brown*, 286 U.S. 131, 142 (1932) (Webb-Kenyon "referred to the prohibitory laws of the States, the enforcement of which it was intended to aid"). Webb-Kenyon gives States power to prohibit shipments only where there is a state law prohibiting possession, sale, or use of liquor. *See Adams Express Co. v. Kentucky*, 238 U.S. 190, 199 (1915); *Brennen v. Southern Express Co.*, 90 S.E. 402 (S.C. 1916) (Webb-Kenyon does not apply unless there is a state law prohibiting receipt, possession, sale, or use of liquor). It does not give States power to prohibit shipments into counties where possession and use of alcohol is legal. *See Seaboard Air Line Ry. v. North Carolina*, 245 U.S. 298, 303 (1917). Congress thus did not surrender control over interstate commerce so as to permit discrimination against alcohol brought into one State from another. *See Pacific Fruit & Produce Co. v. Martin*, 16 F. Supp. 34, 39-40 (W. D. Wash.

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[11] Petitioners' citation to the McCarran-Ferguson Act, which expressly exempts state insurance laws from scrutiny under the dormant Commerce Clause, is unavailing. *See* 03-1116 Br. 36; 03-1120 Br. 17 & n.2. Far from supporting petitioners, McCarran-Ferguson demonstrates that Congress knows how to create an exception to the nondiscrimination principle when it wants to do so.

1936).

## IV. MICHIGAN'S INTERESTS CAN READILY BE MET BY REASONABLE NONDISCRIMINATORY ALTERNATIVES

This Court's dormant Commerce Clause cases "leave open the possibility that a State may validate a statute that discriminates against interstate commerce by showing that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988); *see also Hughes v. Oklahoma*, 441 U.S. 332, 336-37 (1979). Under this exception, the "burden is on the state to show that 'the *discrimination* is demonstrably justified,'" *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 344 (1992) (emphasis in original; citation omitted), and there must be "some reason, apart from origin" to treat out-of-state articles differently, *Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978). The "standards for such justification are high," *New Energy Co.*, 486 U.S. at 278, and require "the clearest showing," *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 393 (1994), not surmise and speculation, *see Hughes*, 441 U.S. at 338. This Court has only rarely found that a State has met its burden of proving the need to discriminate against interstate commerce, and then only upon an extensive factual record clearly demonstrating the absence of workable alternatives. *See Maine v. Taylor*, 477 U.S. 131, 140-43 (1986) (upholding exclusion of imported baitfish that could introduce non-native parasites harmful to Maine fish, where experts testified a total ban was the only way to prevent that).

Michigan has not come close to meeting such a stringent test. The State asserts that the discrimination is necessary to keep wine out of the hands of minors, prevent loss of revenue, and protect public health and safety, but as the Sixth Circuit found, has not supported this assertion with any proof. *See* 03-1116 Pet. App. 15a; 03-1120 Pet. App. 14a-

15a.[12] Michigan's unproven fears that its interests will be compromised by direct shipping are refuted by the finding of the Federal Trade Commission that the twenty-six States that permit direct shipping have encountered no such problems. *See* FTC Report at 38-40. The National Conference of State Legislatures' Model Direct Shipping Bill provides the model of a nondiscriminatory alternative—require that shippers obtain a permit, label packages as containing alcohol, remit taxes, maintain detailed sales records, consent to jurisdiction and inspection, and agree to follow all other state regulations to the same extent as in-state wineries.

Michigan repeats the same argument rejected by the Sixth Circuit, that the three-tier system serves its regulatory interests, so all parts of it are justified. *See* 03-1116 Br. 9-11, 32-33. The argument begs the question why allowing out-of-state wineries to direct ship is a problem, but allowing in-state wineries is not. "[T]he relevant inquiry is not whether Michigan's three-tier system *as a whole* promotes the goals of 'temperance, ensuring an orderly market, and raising

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[12] Recognizing the paucity of the record, the wholesalers urge the Court to apply a new "rational basis test" for discriminatory liquor regulations, asking only whether "there is any reasonably conceivable state of facts that could provide a rational basis for the regulation." 03-1120 Br. 14, 32-33. This test would contradict established authority making clear that discriminatory state liquor regulations are virtually *per se* invalid. *Brown-Forman*, 476 U.S. at 579; *Bacchus*, 468 U.S. at 268-75. The wholesalers would have this Court apply here the deferential review of laws enacted under Congress's affirmative Commerce Clause power. *See* 03-1120 Br. 32 (citing *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981)). These laws, however, as national regulations of interstate commerce, do not raise any prospect of discriminating against (unrepresented) out-of-state entities nor do they have any danger of having an extraterritorial impact in other jurisdictions. Therefore, the only question in such cases is whether Congress's determination that an activity affects interstate commerce is rational. *See Hodel*, 452 U.S. at 276. Here, by contrast, there is every danger that politically powerful insiders have been advantaged at the expense of unrepresented outsiders, and hence a need for judicial solicitude far exceeding mere rationality review.

revenue,' but whether the discriminatory scheme challenged in this case—the direct shipment ban for out-of-state wineries—does so." 03-1116 Pet. App. 15a; 03-1120 Pet. App. 14a; *see also Beskind*, 325 F.3d at 517 ("the question is whether *discriminating* in favor of in-state wineries ... serves a Twenty-first Amendment interest.").

### A. Discrimination Is Not Necessary To Prevent Underage Access To Wine.

Michigan's main defense of its anti-shipment rule is that it protects minors. Aided by several amici, Michigan argues that underage drinking is a serious problem, that minors have easy access to credit cards and the Internet, that the anonymity of electronic purchasing allows minors to easily lie about their ages, and that these factors might in the future translate into an epidemic of minors receiving wine shipments from out-of-state wineries over the Internet.

The argument fails. There is simply no evidence that minors are currently buying wine from out-of-state wineries by direct shipment or that direct shipment would be a likely strategy for minors seeking to purchase liquor.[13] Indeed, the Federal Trade Commission found no evidence that States that allowed direct shipment of wine were experiencing any greater problems with access by minors than States that did not. *See* FTC Report at 34; *see also* C.A. App. 242 (Bridenbaugh Aff. ¶ 22). The evidence shows to the contrary that minors consume mostly beer and hard liquor, and relatively little wine. *See* FTC Report at 12. Minors rarely buy any kind of alcohol by direct shipments, which take several days to arrive, because their purchases tend to be

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[13] In a footnote, Michigan claims to have introduced evidence on this issue, 03-1116 Br. 12, n.18, but they point to nothing in the record. No such evidence exists. *Compare* C.A. App. 92-93 (Stewart Interrog. 2) (testifying that there are no documented cases in which minors received shipments from out-of-state wineries).

spontaneous and designed for immediate consumption. *See id.* at 33 & n.137 (quoting past president of the National Conference of State Liquor Administrators that experience shows "kids want instant gratification"). Since they buy small quantities, minors are much more likely to buy cheaper beer and spirits through offline sources than to pay a hefty 33% to 83% premium to have a bottle of wine shipped. *See id.* at 33-34. They are far more likely to have someone over 21 buy it for them or obtain it from a local retail outlet that does not check IDs. *See id.* at 33; C.A. App. 242 (Bridenbaugh Aff. ¶ 21). Minors also can obtain alcohol easily at parties, from friends and family, and by stealing it. *Reducing Underage Drinking: A Collective Responsibility* 166-68, 175-76 (Richard J. Bonnie & Mary E. O'Connell, eds. 2004).[14]

Michigan and the wholesalers rely heavily on a statement in the *Reducing Underage Drinking* study, published by the National Academy of Sciences, that 10% of minors have obtained alcohol "over the Internet or through home delivery." 03-1116 Br. 11 n.17; 03-1120 Br. 39. Their reliance is misplaced; there actually was no such finding. The source of this statistic is Linda A. Fletcher et al., *Alcohol Home Delivery Services*, 61 J. STUDIES ON ALCOHOL 81, 82 (2000), who reported that 10% of minors had received home deliveries *from local retail stores*, not over the Internet or by direct shipment from out-of-state wineries. Those home deliveries were mostly of keg beer, and there was not a shred of evidence that minors ordered any wine by this method. Petitioners also neglect to point out that this same NAS study did not endorse banning direct shipments to help protect minors, but the nondiscriminatory alternative of licensing and regulation. *See* Bonnie & O'Connell, *supra*, at 6-9, 174-75.

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[14] Available at http://www.nap.edu/books/0309089352/html/ (last visited September 20, 2004).

Even if it were likely that some minors would purchase wine over the Internet, this still would not justify Michigan's *discriminatory* law. It is *already* likely that some minors have such access, because Michigan allows 7684 in-state sellers to take orders by mail, telephone and Internet, and to make home deliveries.[15] Michigan retailers even advertise wine on the Internet and tout their ability to direct ship. C.A. App. 243, 245-46 (Bridenbaugh Aff. ¶ 24, Ex. A). It is therefore impossible to credit Michigan's concern that a direct shipment ban is necessary to prevent underage access to wine.

Michigan bans all direct shipping from out of state, including shipments of wine purchased face-to-face at the winery's tasting room where the seller could see the purchaser and check his or her ID. *See, e.g.*, Ariz. Rev. Stat. § 4-203.04(J) (2003) (permitting direct shipping if purchase made in person at out-of-state winery). But out-of-state wineries are every bit as vigilant in verifying the age of their customers as in-state businesses. *See* C.A. App. 69-70 (Stonington Aff. ¶¶ 4-5); *id.* at 72-73 (Eberle Aff. ¶¶ 4-6); *id.* at 75-76 (Cobb Aff. ¶¶ 4-5); *id.* at 84 (Domaine Alfred Aff. ¶¶ 4-6). The risks, after all, are significant: a winery caught selling to minors can lose its state *and* federal licenses. *See* C.A. App. 241 (Bridenbaugh Aff. ¶¶ 19-20).

If Michigan wants to keep wine out of the hands of

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[15] Mich. Comp. L. § 436.1537 allows licensed retailers and wine makers to sell beer, wine, and spirits for home consumption; this includes the right to ship or deliver to a residence. *See* Mich. Comp. L. § 436.1111(7); Mich. Admin. Code R. 436.1011(7)(b). There are 7644 licensed Michigan retailers authorized to make home deliveries of wine, beer and spirits. *See* Mich. Liquor Control Comm'n, Annual Financial Report 2003 at 10, available at http://www.michigan.gov/documents/annual_report_2003_final_86520_7.pdf (last visited Sept. 20, 2004). There are also 40 Michigan wineries that are allowed to make direct shipments. *See* http://www.michiganwines.com/Wineries/wineries.html (last visited Sept. 20, 2004).

minors, there is a reasonable non-discriminatory alternative to a total ban on shipments from out-of-state wineries. The FTC found that other States permit direct shipping without problem by adopting "various procedural safeguards and enforcement mechanisms to prevent sales to minors." FTC Report at 34. Michigan can enact the Model Direct Shipping Bill, which requires the shipper to affix on the outside of each package of wine a notice that states, "CONTAINS ALCOHOLIC BEVERAGES; SIGNATURE OF PERSON AGED 21 YEARS OR OLDER REQUIRED FOR DELIVERY," and also requires that the recipient prove his or her age. *E.g.*, N.C. St. § 18B-1001.1 (2004).[16] The fact that Michigan already relies on this alternative for the 7684 in-state sellers allowed to direct ship, *see* Mich. Comp. L. § 436.1203(2); Mich. Admin. Code R. 436.1011(7)(b), undermines its purported concern that direct shipment will increase underage access.

**B. Discrimination Is Not Necessary To Prevent Loss Of Tax Revenue.**

Michigan asserts in passing that banning direct wine shipments is necessary to "ensure the collection of taxes." 03-1116 Br. 33. The argument is not developed, probably because, unlike many States that use wholesalers to collect taxes on imported wines, *see* FTC Report at 5, Michigan collects taxes directly from out-of-state wineries on all wine shipped to Michigan wholesalers, *see* Mich. Admin. Code R. 436.1725(2). Michigan does not explain why the State would not be able to collect taxes on wine shipped directly to

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[16] The permit-and-regulation alternative also advances the State's interest in protecting minors more effectively than a total ban, because legal shipments are more easily monitored than illegal ones. *See* FTC Report at 34; *see also* C.A. App. 238 (Bridenbaugh Aff. ¶ 11); *id.* at 94 (Stewart Interrog. 3) (conceding that illegal shipments to minors are difficult to detect).

consumers instead of wholesalers.

Even if Michigan were to fear greater evasion of tax payments from out-of-state shippers than in-state shippers, it can readily protect its tax revenues as other States do—by issuing permits to direct shippers conditioned on their filing regular reports of sales and remitting appropriate taxes. This is the procedure endorsed by the National Conference of State Legislatures as a nondiscriminatory alternative to a ban on direct shipments. *See, e.g.*, S.C. Code Ann. § 61-4-747(C) (2003). As the FTC Report found, States that condition direct shipment on the payment of taxes have experienced no problem with tax evasion. *See* FTC Report at 4, 38-40; *see also* C.A. App. 242 (Bridenbaugh Aff. ¶ 22).[17] Indeed, New Hampshire has used this alternative for several years, *see* N.H. Rev. Stat. § 178:27, and reports that allowing direct shipping has not caused it to lose any tax revenue. To the contrary, New Hampshire's wine tax revenue increased by $121,000 in 2003, soon after it implemented a permit system. *See* Gary Dennis, *Wine Online*, Manchester Union Leader,
Sept. 14, 2003, at F1 (quoting John Byrne, N.H. Liquor Commissioner).

### C. Discrimination is Not Necessary to Maintain an Orderly Market and Protect Public Safety.

Michigan asserts that because unregulated alcoholic beverage sales would pose a danger to public health and safety, it is necessary to ban direct shipping from out-of-state

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[17] Some States express the concern that *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), would prevent them from collecting taxes from out-of-state wineries. *See* Amicus Br. of Ohio *et al.* at 25. The fear is misplaced. *Quill* required a nexus between the business and the State, and a permit would satisfy that requirement.

wineries.[18] This is not the first time a State has come before this Court seeking to discriminate against interstate commerce in the name of public safety. States have used this argument to try to exclude other States' harmful waste from their landfills, *see C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383 (1994); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, 504 U.S. 353, (1992); *Philadelphia v. New Jersey*, 437 U.S. 617 (1978); keep large trucks off their highways, *see Kassell v. Consolidated Freightways Corp.*, 450 U.S. 662, 667 (1981); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978); and exclude unwholesome food products, *see Dean Milk Co. v. Madison*, 340 U.S. 349, 353-54 (1951); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522-23 (1935). This Court has consistently rejected the argument. The fact that the State may legitimately protect health and safety cannot justify discriminatory regulation, because "if a State *discriminates* against out-of-state interests ... such facial discrimination will be subject to a high level of judicial scrutiny even if it is directed toward a legitimate health and safety goal." *GMC v. Tracy*, 519 U.S. 278, 307 n.15 (1997) (emphasis added). A State may regulate in the interests of public safety, of course, but must do so evenhandedly. If an out-of-state wine shipment deserves to be restricted, so does a similar in-state shipment. *See Fort Gratiot Sanitary Landfill*, 504 U.S. at 367 ("no valid health and safety reason for limiting the amount of waste ... from outside the State, but not the amount ... from inside the State").

It is not enough for petitioners to cite statistics about the

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[18] Michigan insists that the Sixth Circuit's decision holds the State powerless to regulate shipping at all. 03-1116 Br. 31-33. But the decision only prohibits them from regulating in a *discriminatory* fashion. Likewise, amici raise a slippery slope argument that the decision will open the door to the direct shipment of beer and spirits. The Sixth Circuit's decision only prohibits Michigan from *discriminating* against out-of-state brewers and distillers.

social costs of alcohol as a justification for the need to heavily regulate. The State's power to regulate alcoholic beverages is not in dispute. Rather, Michigan has the burden of proving the need to *discriminate*. It must show that there is something *more dangerous* about wine from out of state than from within the state. It has not done so, and the Model Direct Shipping Bill sets forth a reasonable nondiscriminatory alternative.

As already noted, Michigan uses this alternative for its in-state wineries. *See* 03-1116 Br. 9-10; Mich. Comp. L. § 436.1203. The State offers no evidence that licensing and regulation would not work equally well for out-of-state wineries. Instead, it suggests that the permit-and-regulation system is inadequate because in-state wineries are "subject to" inspections and searches, and out-of-state wineries are not. 03-1116 Br. 10. This is simply not true. Michigan law provides that a licensee shall make its premises available for inspection, regardless of whether those premises are in-state or out-of-state. *See* Mich. Comp. L. § 436.1217. There is therefore no legal bar to inspecting an out-of-state winery.[19] Moreover, each State regulates its own wineries as Michigan does. *See, e.g.*, Cal. Bus. & Prof. Code § 23356 (2004) (license requirement); Cal. Food & Agric. Code § 41164 (2001) (grape testing and inspection); Cal. Bus. & Prof. Code § 25170 (1997) (labeling restrictions); *id.* § 25236 (content restrictions). Thus, every out-of-state winery already is required to obtain various permits, to maintain its records, and to comply with extensive state (not to mention federal) regulations in order to do business in their home States as well as the twenty-six States that allow direct shipment. *See also* C.A. App. 241 (Bridenbaugh Aff. ¶¶ 19-20). Out-of-

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[19] In any event, Michigan's argument is contrived, because the only evidence in the record demonstrates that state officials do not in fact conduct inspections or searches of in-state wineries. *See* C.A. App. 100 (Stewart Interrog. 9).

state wineries are willing to abide by Michigan laws as well. *See, e.g.*, C.A. App. 85 (Domaine Alfred Aff. ¶ 15).

### D. Discrimination Is Not Necessary To Assure Enforcement Of The Dram Shop Act.

Michigan asserts that its direct shipment ban is necessary because out-of-state sellers are not subject to suit under its dram shop act, Mich. Comp. L. § 436.1801. The assertion is frivolous. As a threshold matter, Michigan's dram shop act primarily applies to bars selling liquor for immediate consumption. *See Browder v. Int'l Fidelity Ins. Co.*, 321 N.W.2d 668, 673 (Mich. 1982). It would seem to have little application to a delivery that takes place several days after the sale. In any event, even if the dram shop act applies to a retail seller that ships alcohol to a minor, it draws no distinction between in-state sellers and out-of-state sellers. The law on its face applies to any retail licensee, including one with a shipping license.[20] Michigan has long-arm statutes that give its courts jurisdiction over any out-of-state person who commits an act resulting in a tort in Michigan. *See* Mich. Comp. L. §§ 600.705, 600.715. And federal diversity jurisdiction gives injured plaintiffs access to federal court. 28 U.S.C. § 1332 (2004). It is therefore not surprising that petitioners do not cite a single Michigan case in which a victim of an alcohol-related injury had any problem obtaining jurisdiction over an out-of-state alcohol supplier.

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[20] Contrary to Michigan's assertion, *Tennile v. Action Distrib. Co.*, 570 N.W.2d 130 (Mich. Ct. App. 1997), did not hold that the Dram Shop Act "only applies to in-State licensed retailers." 03-1116 Br. 33. The *Tennile* case holds that because the dram shop act places liability upon retailers who deliver alcohol directly to customers, it cannot be used to sue a wholesaler. It contains no discussion of in-state versus out-of-state sellers.

### E. The State Will Have No Difficulty Holding Out-Of-State Wineries Accountable.

Most of the nondiscriminatory alternatives discussed above involve licensing out-of-state wineries that want to engage in direct shipping. Petitioners argue that licensing is not a reasonable alternative because the state will not be able to hold out-of-state licensees accountable to the same extent as in-state licensees. This argument appears contrived, because Michigan has already licensed 252 out-of-state businesses as "outstate seller[s] of wine" and allows them to ship to wholesalers. C.A. App. 306-14 (Pride Aff. ¶ 4). Michigan regulates them, tests their wine, restricts their deliveries, requires that they submit regular written reports of sales, and requires them to pay wine taxes on those sales. *See* 03-1116 Br. 9-11. Many of these are exactly the same wineries that would apply for a direct shipment license, and Michigan offers no explanation why it would suddenly lose the ability to hold them accountable merely because some shipments go to individuals instead of wholesalers.

According to the FTC, the twenty-six States that allow direct shipping do not appear to have problems holding out-of-state wineries accountable. *See* FTC Report at 29-31. Background checks can be done electronically. Books, records and financial data can be mailed, faxed, or electronically submitted to Michigan officials. As one court put it, "[i]n this age of ... computer networks, fax machines, and other technological marvels," it is no harder to inspect and regulate out-of-state license holders than in-state ones. *Cooper v. McBeath*, 11 F.3d 547, 554 (5th Cir. 1994). Other investigations can be conducted in exactly the same way Michigan investigates in-state licensees—by sting operations. *See* C.A. App. 99 (Stewart Interrog. 7). State officials could order wine from out-of-state licensees on a random basis or in response to complaints, to verify whether the winery is complying with all state laws regulating

delivery and payment of taxes.

To the extent that Michigan's argument is based on an allegation that it lacks the resources to regulate an increased number of licensed shippers, it is without merit. An inadequate budget might justify limiting the overall number of permits, but cannot justify discrimination by issuing those permits to in-state businesses only. Besides, as this Court has previously pointed out, the State can always raise the additional funds by charging wineries for the reasonable costs of inspections. *See Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354-55 (1951). Michigan already uses this procedure for offsetting the cost of inspecting hospitals, Mich. Comp. L. § 29.2c; rental housing, Mich. Comp. L. § 125.526(12); motor vehicles, Mich. Comp. L. § 257.716(3); and various other items.

Michigan's argument that it lacks the legal ability to enforce its rules against out-of-state wineries therefore is misguided. It can enforce its rules against out-of-state wineries in the same way it enforces against in-state wineries—by requiring out-of-state wineries to obtain a permit as a condition of engaging in direct shipping and then revoking that permit if the wineries break the law. Nor is there any real danger that out-of-state wineries will treat a Michigan permit lightly, *see* 03-1120 Br. 36-37, because the Tax and Trade Bureau may revoke the winery's *federal* permit if that winery violates a State's laws. *See* 27 U.S.C. § 204(e) (2004). Without a federal "basic permit," a winery cannot operate in *any* State. *See* 27 U.S.C. § 203 (2004). The Bureau has assured the States that it will act on their complaints and "take administrative action against a basic permit where a basic permitee ships alcohol beverages products into a State in violation of the laws of that State." BATF Industry Circular 96-3 (1997).

Michigan also can rely upon the Twenty-First Amendment Enforcement Act, which gives the state Attorney General authority to use the federal courts to enforce compliance with

state laws. 27 U.S.C. § 122a(b) (2004). As the National Alcohol Beverage Control Association has observed, the Act "[provides] state governments with an effective tool to use in preventing the illegal interstate flow of alcohol beverages .. into the hands of underage drinkers." FTC Report at 30 & n. 128.

Finally, the wholesalers purport to defend the interests of in-state wineries, arguing that evenhanded direct shipment regulation is unfair because out-of-state wineries can "use direct shipment as a form of regulatory arbitrage," while in-state wineries cannot. 03-1120 Br. at 37. This "unfairness" argument turns the nondiscrimination principle upside down. Even if a State exercises more control over its own wineries, those in-state wineries (along with in-state wholesalers) exert greater political influence in the State than out-of-state wineries. This Court has long recognized that evenhanded regulation of in-state and out-of-state wineries is essential to ensure that local interests are not able to exert their political influence to obtain special favors that are the sure route to "economic Balkanization." *Bacchus*, 468 U.S. at 276; *see also C & A Carbone*, 511 U.S. at 393 ("The Commerce Clause presumes a national market free from local legislation that discriminates in favor of local interests."); *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 184 n.2 (1938) ("[W]hen the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state."). This is why the national economic union presupposes here, as elsewhere, that the nondiscrimination principle trumps the assertion of the need for local favor.

## CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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# In The
# Supreme Court of the United States

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**JENNIFER M. GRANHOLM, Governor; et al.,**
**Petitioners,**
**and**
**MICHIGAN BEER AND WINE WHOLESALERS ASSOCIATION,**
**Respondent,**
**v.**
**ELEANOR HEALD, et al.,**
**Respondents.**

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***On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit***

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## INTRODUCTION

The Command of Section 2 of the 21st Amendment is clear and unmistakable: the "transportation or importation" of intoxicating liquors into Michigan "for delivery or use therein," "in violation of the laws thereof, is herby prohibited." Respondents' proposed delivery violates Michigan law and because the challenged restrictions implement Michigan's constitutional authority, they are permissible. Respondents can prevail in their challenge only if the plain language of the 21st Amendment and the similar language in the Webb-Kenyon Act is not given effect.

Respondents seek to avoid the fact that 70 years ago the Constitution was amended to vest the individual States with authority to control the importation and transportation of this one product, free from limitations of the dormant Commerce Clause that apply to other products. Immediately after adoption of the 21st Amendment this Court upheld its clear meaning in *Young's Market*[1] and *Mahoney*.[2] It continues to acknowledge that principle in more recent decisions, e.g., *North Dakota v. United States*, 495 U.S. 423 (1990) (plurality opinion).

Michigan decided that in order to effectively supervise the traffic in alcoholic beverages all such beverages coming into the State for sale or delivery had to pass into the hands of in-State licensees over whom Michigan has effective regulatory control. Michigan's decision to only allow *intra*state shipment at retail to consumers by a limited number of licensed in-State wine makers who manufacture their own products is permissible because Michigan has effective and immediate

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[1] *State Bd. of Equalization v. Young's Mkt. Co.*, 299 U.S. 59 (1936).

[2] *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938).

control over these in-State licensees. Michigan can easily audit and penalize in-State licensees who do not comply with Michigan's extensive regulatory regime.[3] Such a regulatory regime is rationally related to the legitimate governmental goals of ensuring that alcohol distribution is effectively regulated, that taxes are paid, and that underage drinkers do not have ready access to alcoholic beverages.

Much of Respondents' Counter-Statement of the Case is dedicated to a recitation of the status of the wine production industry, the alleged difficulty and cost in working through the State's three-tier system,[4] and the claimed "trend" among the States to allow out-of-State direct shipment of wine.[5] It also refers to a non-record staff report of the Federal Trade Commission (FTC) of questionable credibility. These statements and the staff report of the FTC are not relevant to a

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[3] There are only forty in-State wine makers in Michigan. Michigan does not require that only Michigan wines can be direct shipped by its licensees; rather, Michigan allows controlled direct shipment by the appropriate licensee of any wine once the product is brought under Michigan's in-State regulatory control.

[4] The only Respondent winery in this case is Domaine Alfred, Inc. It claims that Michigan's three-tier system is too costly and burdensome; however, it admitted that its uses three different wholesalers to distribute its products in other States and that it has never even attempted to enter the Michigan market or inquire about how it can enter that market. C.A. App. 193-194, 473 (Domaine Interrog. Ans. 1, 3-5), D.C. R 81, Ex C. Although the Respondent consumers claim that Michigan should have no problems with tax collection, they took the 5th Amendment when asked if they ever had alcoholic beverages shipped from a seller not licensed to sell alcohol at retail in Michigan and if they paid taxes on those beverages. C.A. App. 372-373 (Ans. to Interrog., 7). Many of the wines they sought were available in Michigan. C.A. App. 315-318 (Wendt Aff'd.). Consumers can also personally transport a case of wine into the State without going through the three-tier system. MCL 436.1203(7)(a).

[5] However, 35 States, including Ohio, Michigan, and New York, are asking this Court to uphold the States' laws regulating and banning the out-of-State importation and direct shipment of alcohol inside its borders.

proper analysis of the issue before this Court. If a State regulation concerns "whether to permit importation or sale of liquor and how to structure the liquor distribution system" – "the central power reserved by § 2 of the 21st Amendment," that is the end of the matter. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 715 (1984). No requirement exists that the State regulation be narrowly drawn so as to minimize the burden on commerce, maximize profits for out-of-State wineries, or provide the greatest selection of wines to Michigan consumers. Section 2 expressly empowers States to restrict imports of alcoholic beverages in a manner that the dormant Commerce Clause would not permit as to other products.

## ARGUMENT

### I. When State legislation concerns the "transportation or importation" of intoxicating liquors "for delivery or use" in the State, the 21st Amendment controls.

The 21st Amendment expressly vests control over the commerce in intoxicating liquors to the States:

> The transportation or importation into any State, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited. U.S. Const. Amend. XXI, § 2.[6]

Statutory and constitutional construction rules require giving effect to the ordinary meaning of the language used. *Garcia v. United States*, 469 U.S. 70, 75 (1984). If the plain

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[6] Respondents fail to even quote the 21st Amendment in their 48-page brief. Strikingly, they concede that the "literal terms" of Section 2 suggest "all encompassing power" to the State but then argue that the literal terms don't mean what they say. Resp. Br., 18-19.

language is unambiguous, judicial inquiry ends, except in "'rare and exceptional circumstances.'" *Id.* Indeed, this Court "has constantly reiterated that the language of the Constitution where clear and unambiguous must be given its plain evident meaning." *Solorio v. United States*, 483 U.S. 435, 454 n. 3 (1987) (quoting *Reid v. Covert*, 354 U.S. 1, 8 (1957) (plurality opinion)). *Id.*

Shortly after the 21st Amendment's ratification by the States, this Court was called upon to interpret it in cases challenging "protectionist" State liquor laws.[7] As in the present case, the challengers in those cases argued that the 21st Amendment could not, in view of the dormant Commerce Clause, be used to treat imported liquor differently than in-State liquor. The Court concluded that such a construction would be a "rewriting" of the 21st Amendment. *Young's Market*, 299 U.S. at 62. This Court later declared that *Young's Market* had settled the question that "under the Amendment, discrimination against imported liquor is permissible." *Mahoney*, 304 U.S. at 403. This Court has never overruled the *Young's Market* line of cases with respect to a State's 21st

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[7] *State Bd. of Equalization v. Young's Mkt. Co.*, 299 U.S. 59 (1936) (California's discriminatory $500 license fee for the privilege of importing beer from outside the State was upheld against a Commerce Clause challenge; *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938)(upholding Minnesota statutory limitation on the types of blended spirits imported into the State, which was not imposed upon those produced in-State); *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391 (1939)(upholding a Michigan statute that prohibited the importation of beer into Michigan from distributors in States that did not allow unrestricted importation of alcohol products manufactured in Michigan); *Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395, 397-398 (1939)(upholding a Missouri ban on the alcohol imports from States that themselves had discriminatory import policies, Justice Brandeis held the alleged discriminatory intent of the Missouri statute to be entirely beside the point); and *Ziffrin, Inc. v. Reeves*, 308 U.S. 132 (1939)(upholding Kentucky Act that imposed rigorous conditions on the transport and delivery of liquor).

Amendment right to control its alcohol importation and distribution system. Instead, this Court has repeatedly reiterated that this is "a regulatory area where the state's authority under the Twenty-first Amendment is transparently clear." *Craig v. Boren*, 429 U.S. 190, 206-207 (1976) *reh'g denied*, 429 U.S. 1124 (1977) (citing *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330 and n. 9 (1964)).

Respondents' argument that the *Young's Market* line of cases and the decision in *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000), did not involve "discriminatory" State liquor laws (*i.e.*, laws that drew distinctions within the challenged regulatory systems) simply does not square with the facts or holdings in those cases. Each of them involved "discriminatory" State Liquor laws that were upheld under the 21st Amendment. See No. 03-1120, MB&WWA Br., 4, 5, 12, 15-16, 24-27.

More recent decisions of this Court do not put this power of the States in question. Nor do they suggest that the plain language of the 21st Amendment, granting the States the power to control their alcohol importation and transportation system, is problematic. *North Dakota v. United States*, 495 U.S. at 431 (States have "'virtually complete control' over the importation and sale of liquor and the structure of the liquor distribution system.") *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 514-515 (1996) (Section 2 delegated to the States the power "to prohibit commerce in" alcoholic beverages and further said that State "regulatory power over this segment of commerce is therefore largely 'unfettered by the Commerce Clause'" citing *Ziffrin, supra*).

## II. Respondents distort the plain language of the Webb-Kenyon Act and incorrectly infer the importation of a "non discrimination" provision from the earlier Wilson Act.

Respondents assert, Resp. Br., 22-25, 32-35, that like the Wilson Act, the Webb-Kenyon Act evidences a Congressional intent that out-of–State shipments of alcoholic beverages may not be treated differently than in-State shipments. That contention is simply wrong, as can be seen from a comparison of the words of the two Acts and the history that resulted in the need for Webb-Kenyon.

The Wilson Act, 27 U.S.C. § 121, was enacted in 1890 and provides, in part:

> All . . . intoxicating liquors . . . transported into any State . . . *shall upon arrival* in such State . . . be subject to the operation and effect of the laws of such State . . . enacted in the exercise of its police powers, *to the same extent and in the same manner as though such* . . . liquors had been produced in such State . . . . (emphasis added)

The Webb-Kenyon Act, 27 U.S.C. § 122, was enacted in 1913[8] and provides, in part:

> The shipment or transportation, in any manner or by any means whatsoever, of any . . . intoxicating liquor of any kind form one State . . . into any other State . . . to be received . . . sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State . . . is hereby prohibited.

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[8] The Webb-Kenyon Act was re-enacted in 1935, after the repeal of Prohibition by the 21st Amendment. The Wilson Act was not re-enacted.

Comparison of the two Acts plainly shows that the Webb-Kenyon Act does not contain the qualifying language set forth in the Wilson Act that imported alcoholic beverages had to be treated in the same "manner as though such liquids or liquors had been produced in such State." Webb-Kenyon actually gave States the right to regulate imported alcoholic beverages in a manner that would not have been permitted under the Wilson Act. A review of the jurisprudence that led to these two statutes confirms that Congressional intent.

Following this Court's decision in *Leisy*,[9] when Congress attempted to free State regulation of alcoholic beverages from the limitations imposed by *Bowman*[10] and *Leisy*, it was initially concerned that States not use their newly liberated power to enact discriminatory legislation. Thus, the Wilson Act, by its explicit terms, did not permit different treatment of alcoholic beverages originating out-of-State since it only removed dormant Commerce Clause protection from shipments of alcoholic beverages upon arrival in the State.

Later in *Scott v. Donald*, 165 U.S. 58 (1897), the Court invalidated South Carolina legislation limiting the permitted mark-up in State dispensaries of in-State wine while not so limiting the mark-up of California wine and prohibiting the direct importation of wine to consumers. The only objection to the challenged legislation was that it violated the dormant Commerce Clause. "We cheerfully concede that the law in question was passed in the bona fide exercise of the police power." *Id.* at 91. The otherwise valid legislation, enacted

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[9] *Leisy v. Hardin*, 135 U.S. 100 (1890)(could not regulate the importation or resale of alcohol as long as the alcohol remained in its original package).

[10] *Bowman v. Chicago & Northwestern Ry.*, 125 U.S. 465 (1888)(could not restrict the importation of liquor to persons possessing a permit).

under the police power, was not saved from dormant Commerce Clause challenge by the Wilson Act because it neither banned the manufacture and sale of intoxicating liquors within the State nor did it apply uniformly to in-State and out-of-State products, as the Wilson Act required. *Id.* at 100.

The next year in *Vance v. Vandercook*, 170 U.S. 438 (1898), the Court was confronted with a challenge to a revised South Carolina dispensary law without the discriminatory mark-up provisions and with a limitation rather than a prohibition of the right to receive out-of-State shipments of alcoholic beverages for use but not for sale. Quoting at length from *Scott*, the Court rejected the claim that the dispensary law was discriminatory. The Wilson Act had been interpreted in *Rhodes v. Iowa*, 170 U.S. 412 (1898) as not applying until shipments were received by the consignee, so the limitation on direct receipt was ruled unconstitutional under the dormant Commerce Clause. *Vance*, 170 U.S. at 451-452.

The Wilson Act still left the States unable to regulate alcoholic beverages effectively, since their policies could be legally frustrated by shipments from out-of-State. In *Dugan v. Bridges*, 16 F. Supp. 694, 704 (D.N.H. 1936) the distinction between the Wilson and Webb-Kenyon Acts is well recognized. There a three-judge court, in rejecting a Commerce Clause and Fourteenth Amendment challenge to a New Hampshire law conditioning importation of alcoholic beverages to in-State wholesalers upon the manufacturer's receipt of a certificate of approval, wrote of the Webb-Kenyon Act:

> This act in its original form contained the same language that was used in the Wilson Act to prevent discrimination against out-of-state products . . . . [citation omitted] In the act as finally passed, the restrictive language does not appear. Its omission seems important. It shows an intent to give the states

> an entirely free hand in regulating the importation and transportation of liquor. *Id.* at 704.
>
> The Court then observed:
>
> There appears to be no prohibition in the act against discrimination between liquors produced within the state and those produced outside the state. *Id.*

The Webb-Kenyon Act was passed only after President Taft first vetoed it on constitutional grounds. See 49 Cong. Rec. 4291-4292, 4299, 4447 (1913). President Taft had vetoed the Act, criticizing it for permitting "the states to exercise their old authority, before they became states, [*i.e.* before ratification of the Constitution] to interfere with commerce between them and their neighbors." See 49 Cong. Rec. 4292. The Webb-Kenyon Act was intended to and did permit effective State regulation. It did so in a way that protected from dormant Commerce Clause challenge legislation that might be criticized as 'discriminatory.'[11]

## III. Michigan's regulations are necessary for effective alcohol regulation.

### A. Effective alcohol regulation requires drawing distinctions.

Respondents object to Michigan's alcoholic beverage regulatory scheme because they claim it makes a "discriminatory" distinction between out-of-State and in-State

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[11] In *Clark Distilling Co. v. Western M. R. Co.*, 242 U.S. 311, 325 (1917) this Court held that the "[Webb-Kenyon] act did not simply forbid the introduction of liquor into a State for a prohibited use, but took the protection of interstate commerce away from all receipt and possession of liquor prohibited by state law."

wineries. However, Michigan rationally decided that effective alcoholic beverage regulation requires this distinction is necessary.[12]

The 21st Amendment and the Webb-Kenyon Act authorize Michigan to channel out-of-State shipments of alcohol to licensed wholesalers in order to achieve regulatory control through a transparent and accountable distribution system. For regulatory control out-of-State shipments are simply not the same as in-State ones.[13] Michigan has rationally determined that it cannot effectively track out-of-State direct shipments to prevent illegal alcohol sales, collect taxes, or take meaningful enforcement action (*i.e.* it cannot effectively close out-of-State businesses that violate its laws). Michigan does not discriminate against out-of-State wines. The Michigan market is open to out-of-State wines and for the most part (like most other States) its wine retail market consists of imported wines.[14] Michigan's regulatory distinctions between out-of-State shipment directly to Michigan residents and in-State

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[12] For example, Michigan's Liquor Code (like every other State) makes many different kinds of distinctions in or between classes of licenses that permit sales and consumption of alcohol. MCL 436.1107(2)-(11). Also see MCL 436.1503(1)(location of alcohol retail licensee must be 500 feet from church or school building); Mich Admin Code r 436.1133 (retail hard liquor business can't be within one half mile of another); MCL 436.1541, Mich Admin Code r 436.1129(3)(a); 436.1135(3)(a) (Restrictions on retailers with gas pumps); Mich Admin Code r 436.1311 (Prohibiting advertising referencing minors); MCL 436.1916 (Restricting Entertainment).

[13] Unlawful discrimination exists only when a State discriminates among similarly situated in-State and out-of-State interests. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 125-126 (1978). See also, *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 216 (2nd Cir. 2003).

[14] See http://www.wineinstitute.org/communications/statistics/Sales_03.htm.

shipment to Michigan residents merely reflects the fact that the out-of-State direct shipment operates outside of Michigan's strict regulatory system and the in-State shipment does not.

All states regulate alcoholic beverages more extensively than they do most other products. All states make distinctions among alcoholic beverages when regulating their distribution, sale, or use. The traffic, type of shipment, or use made of one intoxicant may be more harmful to the public peace and health than another. The question whether one intoxicant or its shipment is more harmful, requiring greater restraint, is a question that depends upon a variety of circumstances subject to the exercise of judgment and discretion on the part of each State's Legislature and Liquor Control Commission. In this regard, the 21st Amendment and the Webb-Kenyon Act grant broad authority to the States to regulate the transportation and importation of alcohol. The States' regulatory classifications are not subject to strict scrutiny. This is not to say that the 21st Amendment or the Webb-Kenyon Act empower a State to act with "total irrationality or invidious discrimination" in controlling the distribution and shipment of alcohol. See *Craig*, 429 U.S. at 212-14 (Stewart, J., concurring).[15] Since Michigan's laws regulating the importation, distribution and sale of alcoholic beverages are neither irrational nor invidious, they are constitutionally protected.

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[15] See also, *Mahoney*, 304 U.S. at 403; *Kronheim & Co. v. District of Columbia*, 91 F.3d 193 (D.C. 1996), *cert. den.* 520 U.S. 1186 (1997) (D.C. law that generally forbids alcoholic beverage licensees from storing beverages outside the District upheld as valid under the 21st Amendment); *Felix v. Milliken*, 463 F. Supp. 1360 (E.D. Mich. 1978)(Equal Protection challenge to Michigan's law raising the legal drinking age to 21 upheld); and *Inturri v. Healy*, 426 F. Supp. 543 (D. Conn. 1977)(distinctions in alcohol regulation between dinner theatres, lounges, and cafes are valid).

Although they focus on wine, Respondents' argument boils down to the proposition that under the dormant Commerce Clause, any privilege that Michigan grants to an in-State alcohol beverage licensee must also be granted to an out-of-State entity engaged in the same general profession (e.g., wine maker, retailer, wholesaler, brewpubs). Respondents assert that since Michigan allows in-State wine makers to ship their products directly to Michigan consumers, it must also let out-of-State wine makers ship directly to Michigan residents. Taken to its logical conclusion, that would require that since Michigan allows certain other licensed in-State retailers operating within the three-tier system to directly ship alcoholic beverages to Michigan residents, then any of the hundreds of thousands of out-of-State retailers in alcoholic beverages should also be able to directly ship alcoholic beverages to Michigan residents. This would turn Michigan's and other States' systems upside down. In addition, such a decision could perversely result in the kind of reverse discrimination resembling "that created by *Bowman, Leisy, Rhodes, Vance,* and the original package doctrine a century ago, when States discriminated against in-State sellers, because they could not effectively govern direct shipments from elsewhere." *Bridenbaugh,* 227 F.3d at 854.

The bottom line is that Respondents' goal could lead to a market in alcoholic beverages over which States will have lost effective control. Accordingly, under their theory many States' importation and distribution regulations would be invalid under the Commerce Clause despite the 21st Amendment.[16] For

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16 Respondents and some of the Amici point to Michigan's Out of State Seller of Wine license (OSSW) as evidence of discrimination or economic protectionism. However, they misunderstand how an OSSW license works and inappropriately compare it to a small Michigan wine maker license fee. An OSSW license is more akin to a license to act as an agent for the out-of-State sale of wine through Michigan's three-tier system. Mich. Admin. Code r. 436.1705, C.A. App. 315-317 (Wendt Aff'd.). A small out-of-State

instance, under Respondents' theory of the law, the reciprocal shipping States they and other *Amici* refer to in their briefs could be struck down under the dormant Commerce Clause since those reciprocal laws discriminate against wineries in States that do not allow direct shipping. See Calif., *et al.*, Amici Br., 1. Even the proposed Model Shipping legislation cited by Respondents would not be impervious to Commerce Clause attack.

### B. Federal enforcement laws are no substitute for State regulation and the 21st Amendment Enforcement Act does not evidence Congress's intent not to allow States to regulate out-of-State shipments.

Respondents and other *Amici* suggest that Michigan can rely upon the 21st Amendment Enforcement Act, 27 U.S.C. § 122a(b) (2004), and the power of the United States Tax and Trade Bureau (TTB)[17] to pull federal permits under 27 U.S.C. § 203 (2004), to enforce compliance with its shipment laws. Resp. Br., 46-47, Mem. of Cong. Amici Br., 1, 28-29. This argument is meritless.

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winery wishing to sell its wine is not required to pay the $300 license fee. It only needs to find one of many OSSW licensees. *Id.* The $25 in-State wine maker fee does not account for all of the additional regulatory costs and local permit costs associated with operating this highly regulated business in Michigan. MCL 436.1537(3). In addition to other requirements, payment of an additional $100 fee must be paid by the small Michigan wine maker for sales and wine tasting at each off-premise location. To sell other beer and wine products, Michigan wine makers must pay an additional $100 license fee. MCL 436.1525(j).

[17] The United States Tax and Trade Bureau was formerly known as the Bureau of Alcohol, Tobacco, and Firearms.

First, as New York and the *Amici* States point out[18], the 21st Amendment Enforcement Act provides for injunctive relief only. Second, when Michigan attempts enforcement action against illegal out-of-State shippers, jurisdictional defenses are raised which are difficult if not impossible to overcome. For instance, when Michigan attempted enforcement efforts against out-of-State manufactures and retailers such as the Great American Beer Club, California Wine Club, the Wine Exchange, Best Buy Wine Club, Pop's Wine and Spirits, and Connoisseur Imports they all claimed Michigan lacked jurisdiction and asserted that *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) prevented the collection of taxes and that the 21st Amendment is no exception.[19] It is no wonder Respondents gloss over *Quill* and suggest that licensing out-of-State shippers would resolve the tax collection problem. Resp. Br., 41, n. 17. However, what constitutional licensing scheme a State chooses to adopt for the out-of-State shipments of alcohol imported into its territory is a legislative choice reserved to the States by the 10th and 21st Amendments.

The suggestion that the TTB will pull an illegal shipper's permit is open to question. TTB, not the State, makes the decision on whether to take action based on whether "there is a continuing, material, adverse impact upon a State through the actions of a basic permittee located outside the boundaries of the affected State" and the "extent of this authority does not extend to situations where an out-of-State retailer is making the shipment into the State of the consumer."[20] "Retailers are not

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18 No. 03-1274, NY Resp. Br., 34, n. 9.

19 C.A. App. 328-355. Also See Amicus Br. of Ohio, *et al.* at 25, No. 03-1274, NY Resp. Br., 34-35.

20 ATF Industry Circular No. 96-3, Direct Shipment Sales of Alcohol Beverages (Feb. 11, 1997) cited in the Br. of Resp., at 46, was modified by a TTB ruling found at: http://www.atf.gov/pub/qtrly_bulletins/ vol2_qb 2000/rulings.pdf.

required to obtain basic permits under the (FAA Act)," Federal Alcohol Administration Act, 27 U.S.C. § 201 *et seq. Id.* TTB has also made it clear on its Internet site that for the most part it leaves the regulation up to the States.[21]

Certain *Amici* Congressmen, mainly from the State of California, claim that the 21st Amendment Enforcement Act of 2000, 27 U.S.C. § 122a, somehow reaffirmed that States were not delegated the authority to regulate out-of-State shipments. *Mem. Cong. Amici Br.*, 1-3, 19-21. The fallacy of this argument, of course, is that the Act itself does nothing more than provide an injunctive enforcement method the States can employ against illegal shippers provided they are engaged in a "valid exercise of power" under the 21st Amendment as interpreted by the Supreme Court in conjunction with other provisions of the Constitution. 27 U.S.C. § 122a (e)(1). The statute does not specify what constitutes the 21st Amendment power of the States, it does not specifically exclude States that ban direct shipping from its benefits, and it does not conclude that Michigan law is unconstitutional. That issue is presently before this Court and the 21st Amendment Enforcement Act is not.[22]

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21 At: http://www.atf.gov/alcohol/info/faq/genalcohol.htm#g5

22 The Cargo Airline Association Amici assert that the Federal Aviation Administration Authorization Act of 1994 (FAAAA), 108 Stat. 1569, 1605-1607, preempts Michigan's shipment laws pertaining to distribution of alcohol, specifically, MCL 436.1203(1). Cargo Airline Amici Br., 6-24. This assertion, well outside of the terms of the grant of certiorari, Sup. Ct. R. 14.1(a), is untenable. The 21st Amendment protects State importation controls even if Congress should repeal the Webb-Kenyon Act and declare free trade in alcoholic beverages. That is why section 2 was placed in the 21st Amendment. Congress may not evade the Constitution indirectly by deregulating the means by which alcoholic beverages are imported. That argument would prohibit importation controls even for "bone-dry" States, which prohibit the manufacture, sale, and importation of alcoholic beverages.

Michigan categorically rejects Respondents' assertion that the regulatory concerns of the State with respect to out-of-State direct shipments are unfounded. Respondents go so far as to claim that there is no evidence that minors are buying, or would buy, wine or liquor from out-of-State shippers. This is simply wrong.[23] An example of the severity of the problem is shown in recent press reports from the State of Washington. There "a bunch of Gonzaga University students . . . ordered liquor, beer and wine 'on-line' and had it delivered to their door steps without ever being questioned about their age."[24] A demand was made to the Washington State Attorney General to take action against Internet retailers. Similarly, in June of this year, the Massachusetts Attorney General "filed a lawsuit against four Internet retailers from four different States for selling alcohol to minors." *Id.*[25]

### C. The staff Federal Trade Commission (FTC) report cited by Respondents is neither credible nor persuasive.

The staff Federal Trade Commission (FTC) report, cited by Respondents and their *Amici*, claiming that States that allow

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[23] C.A. App. 92-93 (Stewart Interrog. 2). (In one year 3624 controlled buy operations with underage decoys were conducted and 29% of those retailers made attempted sales to the undercover (decoy) minors.) C.A. App. 322-324 (Smith Aff'd.), 325-327 (Mead Aff'd.), 356-360, 448-472. Respondents' assertion that the State does not do inspections is also wrong. (2507 investigations conducted of licensees approving adequate physical plant, building code and sales compliance, and many other factors which of necessity encompass frequent inspections.) C.A. App. 322-324. Also see D.C. R 54, Ex 11, Attach C, (showing enforcement actions against Michigan Wine Makers and Brew Pubs).

[24] At: http://seattlepi.nwsource.com/local/185415_liquor09.html. (Seattle Post-Intelligencer (8/9/04)). For other examples, see Michigan Assoc. of Sec. Sch. Prin., et al., Amici Br., 10-22.

[25] Obtaining jurisdiction over out-of-State entities shipping alcohol is a nightmare. See Pet. Br., 33, n. 24.

out-of-State direct shipments are not experiencing problems, is neither credible nor persuasive.[26] The report is not based upon any independent research studies or findings. It is mainly based on ten States' responses to a questionnaire sent out by the staff of the FTC. Eight of those States had not even conducted investigations on the issue. *FTC Report* at 31-33. The report did note "that Michigan found that '[a]bout one in three websites contacted' (roughly 33%) agreed to sell alcohol to the minor with no more age verification than a mouse click, and that UPS delivery people did not properly verify the recipients' ages." It also noted that other States found that minors can buy wine online. *Id.* at 35. It does not focus on the merits of the tax debate and it relies on a self-serving statement by the Wine Institute (a trade association of pro-direct shipment interests) that its members will comply with the law and pay taxes. *Id.* at 39-40.

## IV. Effectuation of the plain language of the 21st Amendment as an exception to the Commence Clause does not undermine other valid Commerce Clause applications.

### A. Bacchus is distinguishable and is not controlling.

As shown in Pet. Br., 27-29, *Bacchus Imports, Ltd. v Dias*, 468 U.S. 263 (1984), is distinguishable on its facts and, therefore, not controlling. Michigan (like its *Amici* States) respectfully suggests that *Bacchus* was erroneously decided or that it should be limited to its facts, *i.e.*, where a State explicitly disavows any regulatory purpose in alcoholic beverage laws.

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26 FTC, Staff Report, 7/3/03, at: http://www.ftc.gov/os/2003/07/winereport2.pdf. Compare Amicus brief for Ohio, et al, p. 26, describing State concerns and problems.

Respondents' statement that, "Not a single opinion by any Justice has called *Bacchus* into question," is simply incorrect. Resp. Br., 29. See, e.g., *City of Newport v. Iacobucci*, 479 U.S. 92, 98 (1986) (Stevens, J., specifically referenced *Bacchus* in his dissent with whom Brennan, J., joined, when he said in no uncertain terms that the Court has completely distorted the 21st Amendment); *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 352-360 (1986) (O'Connor, J., dissenting, joined by Rehnquist, C.J., called *Bacchus* into serious question); and *James B. Distilling Co. v. Georgia*, 501 U.S. 529, 557 (1991) (O'Connor, J., with whom Rehnquist, C.J., and Kennedy, J., joined, stating that "The court's conclusion in *Bacchus* was unprecedented.")

Justice Stevens, dissenting in *Bacchus*, correctly noted that the majority adopted a "totally novel approach to the Twenty-first Amendment." *Bacchus,* 468 U.S. at 286-287 (Stevens, J., dissenting). The proper question then and now "is not one of 'deference,' nor one of 'central purposes'; the question is whether the provision in this case is an exercise of a power expressly conferred upon the States by the Constitution. It plainly is." *Id.* at 287. Clearly, Michigan's out-of-State direct shipment ban falls "squarely within the protection given to" it by the 21st Amendment, "which expressly mentions 'delivery or use therein.'" *Id.* at 280.

Revisiting *Bacchus* would not require reconsideration of any other decision of this Court. It would prevent lower courts from misreading that decision as a general warrant to strike down State regulation of the importation, distribution, and sale of alcoholic beverages because some other State has chosen to live with less effective regulation or because the challenged law does not comport with some other conception of reasonableness.

### B. The 21st Amendment creates an exception for alcoholic beverages from traditional Commerce Clause considerations.

The late nineteenth century saw the development of an "unedifying history" (*Carter v. Virginia,* 321 U.S. 131, 142, J. Frankfurter, concurring [1944]) of a body of case law that applied a rigid formulation of the dormant Commerce Clause, frustrating State efforts to establish effective alcoholic beverage importation regulations. That analysis treated alcoholic beverages the same as other items of commerce, like cheese, for purposes of Commerce Clause analysis even as it held that the police power of the State otherwise permitted much more extensive regulation of alcoholic beverages than of almost all other products. Congress recognized that alcohol is not like cheese, however, and soon made changes to effectuate the distinctions. The Wilson Act, and subsequently the Webb-Kenyon Act and the 21st Amendment, were each efforts, along different lines, to undue that nineteenth century jurisprudence. Each of those enactments gave States progressively greater control over the importation of alcoholic beverages.

Affirming Michigan's constitutional authority to enforce effectively its regulatory system for the importation, distribution, and sale of alcoholic beverages under the 21st Amendment has no necessary implications for dormant Commerce Clause analysis in general. Citations to Commerce Clause opinions of this Court and quotations from Justice Jackson in *H.P. Hood & Sons, Inc. v. Du Mond,* 336 U.S. 525 (1949) are irrelevant. See NBWA Amicus Br., 8 n. 5. In *Duckworth v. Arkansas*, 314 U.S. 390, 397-402 (1941), Jackson, J., concurred in the result, asserting that failure to uphold State laws by reference to the 21st Amendment, instead holding them reasonable under the dormant Commerce Clause, weakened both the 21st Amendment and the dormant Commerce Clause. To him, affirming State alcoholic beverage law by reference to the 21st Amendment was consistent with a

strong dormant Commerce Clause. The 21st Amendment authorizes a constitutional regime for alcoholic beverages that is distinct from that for other products. The Webb-Kenyon Act and the 21st Amendment were clearly efforts to overcome Commerce Clause constraints on the States that this Court had found in its pre-Webb-Kenyon jurisprudence.

Respondents quote James Madison for the principle of a strong economic union but Madison also wrote "the powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." The Federalist No. 45, pp 292-293 (C. Rossiter ed. 1961). The Respondents are asking this Court to rewrite the 21st Amendment and Webb-Kenyon Act by blue-penciling out powers that have been explicitly given to the States. This Court should decline the invitation.

## CONCLUSION

The decision of the United States Court of Appeals for the Sixth Circuit should be reversed.

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IN THE

# Supreme Court of the United States

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,
*Petitioner*,

*v.*

ELEANOR HEALD, *et al.*,
*Respondents.*

**ON WRIT OF CERTIORARI**
**TO THE UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

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The Michigan plaintiffs (respondents in No. 03-1120) concede that (i) States have unique interests in regulating the distribution of beverage alcohol to their citizens (Br. 10, 22, 43); (ii) States cannot effectively regulate such distribution unless they can control the flow of beverage alcohol across their borders (Br. 22); and (iii) the Twenty-first Amendment and the Webb-Kenyon Act were therefore adopted and worded to carve an exception to the dormant Commerce Clause (Br. 21).

Plaintiffs argue that the constitutionally authorized barrier against unlicensed imports that Michigan (like most other States) has had in place since Prohibition comes tumbling down because the State gives one class of state licensees, who are physically located in the State and subject to its life-or-death regulation, a privilege of shipping directly to customers that is not extended to unlicensed out-of-state entities. Their argument is that the difference in regulation is "discrimination" that eliminates Twenty-first Amendment protection and subjects Michigan's law to "strict scrutiny" to see whether the interests of Michigan and its residents would be just as well protected by a less restrictive approach than the Legislature has chosen.

But there is no constitutional principle that States must treat out-of-state and in-state suppliers of beverage alcohol identically or equally, nor (with respect to this product) is there a national preference for open competition, minimal regulation, maximal availability, and low prices. The Twenty-first Amendment and Webb-Kenyon protect the States' broad discretion over the distribution of alcohol to their residents, by giving the States "virtually plenary" control over physical importation. Nothing in their language or history or in this Court's cases suggests that state control over importation is to be limited by the way a State regulates purely in-state distribution activities. All that the Constitution requires is that state regulation of the importation or transportation of beverage alcohol, including any distinctions the State chooses to draw, be rational (as congressional regulation of other parts of commerce must be) and

not violate other provisions of the Constitution that the Twenty-first Amendment was not intended to affect.

Even if it were the responsibility of the courts, rather than the Michigan Legislature, to determine what regulatory system works best in Michigan, plaintiffs have not shown how a State can effectively enforce its restrictions on the distribution of alcoholic beverages and collect its tax revenues if it must permit direct shipment by out-of-state entities. A court-imposed permit system licensing an unbounded number of out-of-state sellers would overwhelm Michigan regulators and leave them without their most effective tool: the ability to put violators out of business. The federal enforcement mechanisms that plaintiffs cite are weak substitutes, and forcing Michigan to rely on them is inconsistent with the basic allocation of responsibility that the Twenty-first Amendment established.

If Michigan cannot draw rational distinctions between out-of-state and in-state suppliers of alcoholic beverages, there is no obvious reason why it would not be required to allow any out-of-state wholesaler to ship wine, beer, and spirits to in-state retailers, and to allow any out-of-state retailer to ship wine, beer, and spirits directly to consumers. That would largely mean the end of the three-tier system of regulation that this Court has called "unquestionably legitimate." *North Dakota* v. *United States*, 495 U.S. 423, 432 (1990) (plurality opinion of Stevens, J.); *see also id.* at 447 (Scalia, J., concurring in judgment). This case is not about "fine and rare wines" but about the viability of the entire system of alcohol regulation that the States have relied upon for 70 years.

## I. WEBB-KENYON AND THE TWENTY-FIRST AMENDMENT NEITHER INCORPORATE NOR PERMIT ANY REQUIREMENT THAT STATES TREAT OUT-OF-STATE AND IN-STATE SUPPLIERS IDENTICALLY.

Webb-Kenyon and the Twenty-first Amendment grant the States authority to regulate the "transportation or importation" of beverage alcohol. Neither the texts of these provisions nor their historical background authorize the im-

position of a requirement that States either treat out-of-state suppliers identically with in-state licensees or face strict judicial scrutiny.

1. Plaintiffs argue that Webb-Kenyon and, by implication, the Twenty-first Amendment "only prohibit[] shipments into dry areas" (Br. 10), and that they therefore "cannot be read" to displace the dormant Commerce Clause in States (such as Michigan) that regulate, but do not bar, the distribution of alcohol (Br. 10, 34; *see also* Br. 21, 23-25 & n.9). That argument rests on misreading *Seaboard Air Line Railway* v. *North Carolina*, 245 U.S. 298 (1917). The passage plaintiffs cite is the Court's summary of the respondent's position in that case. *See id.* at 303. On the next page, the Court rejects that position, and the actual holding of *Seaboard* is the opposite of what plaintiffs claim: "[I]nstead of interposing an absolute bar against all . . . shipments [of imported alcohol], as it was within the power of the state to do," North Carolina had the authority under Webb-Kenyon to "permit[] them upon conditions . . . . The greater power includes the less." *Id.* at 304.[1]

Representative Webb made this clear at the adoption of Webb-Kenyon in 1913. It "applies to all States, 'wet' and 'dry' alike, because every State in the Union has laws against the unrestricted sale of liquor, and this bill would protect the 'wet' States whose laws are to be violated in the use or sale of liquor as well as it would protect the 'dry' States under the same circumstances. It is a State rights measure." 49 Cong. Rec. 2,812 (1913). The later adoption of nearly identical language in the Twenty-first Amendment in

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[1] Other pre-Twenty-first Amendment cases are consistent. *See Rainier Brewing Co.* v. *Great N. Pac. S.S. Co.*, 259 U.S. 150, 154 (1922) (interpreting Webb-Kenyon to authorize State to limit quantity of alcohol that citizens could import and manner in which it could be shipped); *Clark Distilling Co.* v. *Western Md. Ry. Co.*, 242 U.S. 311, 324 (1917) (Webb-Kenyon Act "operated . . . irrespective of whether the state law did or did not prohibit the individual use of liquor."); *cf. Vance* v. *W.A. Vandercook Co.*, 170 U.S. 438, 447 (1898) (Wilson Act).

1933, and the re-enactment of Webb-Kenyon in 1935, ratified the Court's interpretation of Webb-Kenyon in *Seaboard*.[2]

2. The texts of the Twenty-first Amendment and Webb Kenyon broadly prohibit exactly what plaintiffs seek to do here, without any suggestion that state laws must treat out-of-state suppliers identically or equally with in-state licensees. *See* MB&WWA Br. 15. Plaintiffs nevertheless argue (Br. 20-25) that these provisions were adopted only to reverse the "*Bowman/Rhodes* line of cases and did not affect the rule against discrimination" plaintiffs say was established in cases such as *Tiernan* v. *Rinker*, 102 U.S. 123 (1880), and *Walling* v. *Michigan*, 116 U.S. 446 (1886), and that there is no legislative history specifically approving state laws treating out-of-state and in-state entities differently.

But, first, there would be no warrant for limiting the protection clearly granted by the Amendment and Webb-Kenyon because of supposed silence in their legislative histories. As the Court demonstrated in interpreting the Amendment itself shortly after adoption (*see infra* pp. 7-9), "where the language is unambiguous, silence in the legislative history cannot be controlling." *Dewsnup* v. *Timm*, 502 U.S. 410, 419-420 (1992); *see also Hibbs* v. *Winn*, 124 S. Ct. 2276, 2300 (2004).

Second, the legislative history is *not* silent. An initial draft of Webb-Kenyon included nondiscrimination language, but Congress, on clear notice that States might discriminate between in-state and out-of-state suppliers, chose not to include that language in either Webb-Kenyon or the Twenty-

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[2] Plaintiffs also cite several statements in the legislative history as establishing that "[t]he core concern of the legislative drafters of . . . the Twenty-First Amendment" was to ensure that dry States could remain dry after Repeal. Br. 25 n.9. But while this was obviously an objective, it was hardly the only one. The statements cited by plaintiffs are perfectly compatible with the many statements showing that Congress intended to protect state rights more broadly. *See* MB&WWA Br. 21-22.

first Amendment. *See* MB&WWA Br. 24.[3] In historical context, this choice must be read as intentional—and it was so read at the time in a judicial decision that MB&WWA cited but that plaintiffs fail to address. *See Dugan* v. *Bridges*, 16 F. Supp. 694, 704 (D.N.H. 1936). As Senator Blaine put it during the deliberations, the Amendment gave States "*absolute control in effect* over interstate commerce affecting intoxicating liquors which enter the confines of the States." 76 Cong. Rec. 4,143 (1933) (emphasis added).[4]

Third, *Bowman* v. *Chicago Northwestern Railway*, 125 U.S. 465 (1888), *Rhodes*, *supra*, *Tiernan*, *supra*, and *Walling*, *supra*, all rested on the *same* principle—that importation of alcohol was interstate commerce with which States could not interfere. *See Walling*, 116 U.S. at 461; *Tiernan*, 102 U.S. at 127. Indeed, the Court stated in *Bowman* that "[t]he present case is concluded, we think, by the judgment of this Court in *Walling*," 125 U.S. at 495, and the Court expressly rejected any attempt to distinguish *Walling* on the grounds that the statute there "made a discrimination" in favor of in-state citizens, *id.* at 496. Rather, the operative principle in both cases was that "[i]nterstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce . . . ." *Id.* (quoting

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[3] *Amici* DKT Liberty Project (DKT) and Napa Valley Vintners (NVV) attempt to dismiss the Senate's deletion of the nondiscrimination language as merely a procedural maneuver in order to conform the Senate version of the bill to the House version. *See* DKT Br. 17-18 n.5; NVV Br. 17. At best, that does not answer why the House bill omitted that language in the first place.

[4] *Amicus* NVV misreads (NVV Br. 16-17) the statement by Senator Stone that the Webb-Kenyon Act would "put the shipper outside of [a State] upon a level . . . with the shipper within the State." 49 Cong. Rec. 2,917 (1913). In context, Senator Stone was merely explaining that Webb-Kenyon would remedy a perverse consequence of the Wilson Act, namely that out-of-state manufacturers could ship to in-state customers while in-state shippers could not. *See generally Rhodes* v. *Iowa*, 170 U.S. 412 (1898). Senator Stone later clarified that Webb-Kenyon was designed to "enable the State to enforce its own internal policy" and "[h]ow [the liquor traffic] shall be regulated is a question each State should answer for itself . . . ." 49 Cong. Rec. 2,917 (1913).

*Robbins* v. *Shelby County Taxing Dist.*, 120 U.S. 489, 497 (1887)). When Webb-Kenyon and the Twenty-first Amendment rejected that principle, they overturned all four cases, destroying the foundation of *Tiernan* and *Walling* as well as that of *Bowman* and *Rhodes*.[5]

Fourth, and most important, the Twenty-first Amendment and Webb-Kenyon are themselves inherently "discriminatory" in the sense plaintiffs mean, because they focus on "importation" to enable States to deal with the inherent difference between out-of-state suppliers and in-state licensees. *See Bridenbaugh* v. *Freeman-Wilson*, 227 F.3d 848, 853 (7th Cir. 2000). Out-of-state suppliers are not effectively subject to the full range of state regulation, so Michigan and other States have chosen to require that when they sell for in-state consumption, they do so through another firm that is. This treatment of out-of-state producers as a distinct class follows naturally from the States' constitutional and statutory authority to regulate "importation."

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[5] As the Court noted in *Clark Distilling*, Webb-Kenyon's official title was "An Act divesting intoxicating liquors of their interstate character in certain cases," 242 U.S. at 321, and the statute was enacted to "prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws," *id.* at 324. If imported alcohol is divested of its "interstate character" and stripped of the "immunity characteristic" ordinarily accorded by the Constitution, it must be treated, for constitutional purposes, as *intra*state commerce—*i.e.*, subject to the plenary regulatory power of the State, which is subject to constitutional challenge only to the same very limited extent as other state internal economic regulation.

*Amicus* DKT asserts that "discriminatory laws are not proper or bona fide police laws in the first place" (DKT Br. 15), but it cites no source for any such free-floating restriction on state legislative power. The cases that DKT does cite are cases in which the police power was limited *by the dormant Commerce Clause*. *See, e.g.*, *Vance*, 170 U.S. at 455; *Scott* v. *Donald*, 165 U.S. 58, 91 (1897) ("We cheerfully concede that the [discriminatory] law in question was passed in the bona fide exercise of the police power," but that statute still may be "repugnant to the constitution of the United States"); *Walling*, 116 U.S. at 455. Since the Amendment rendered that doctrine inapplicable to restrictions on alcohol importation, the States' police power is not subject to any other limitation.

3. Finally, plaintiffs' argument (Br. 19-20) that this Court should read a nondiscrimination clause into the Twenty-first Amendment, because it has previously read exceptions into the Amendment to protect personal constitutional rights and Congress's authority to enact legislation, misses the point. None of the constitutional provisions or federal laws at issue in those cases played any role in the adoption of Webb-Kenyon and the Twenty-first Amendment. The purpose of Webb-Kenyon and the Twenty-first Amendment, as plaintiffs concede (Br. 21), was to exempt States from the dormant Commerce Clause. At least after the Twenty-first Amendment, there is no constitutional right to have beverage alcohol as widely and cheaply available as possible, or to sell into a State on the same terms as an in-state licensee.[6]

## II. THIS COURT'S CASES REFUTE PLAINTIFFS' CONTENTION THAT ANY STATE STATUTE THAT DRAWS A DISTINCTION BETWEEN IN-STATE AND OUT-OF-STATE ALCOHOL SUPPLIERS IS SUBJECT TO STRICT SCRUTINY.

This Court's cases have consistently interpreted the Twenty-first Amendment to allow States to draw rational distinctions between in-state and out-of-state suppliers of alcoholic beverages. In adopting the Twenty-first Amendment, the Nation gave each *State* the authority to regulate one small portion of interstate commerce—the "transportation or importation" of alcohol into the State "for delivery or use therein"—and nothing in this Court's case law suggests

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[6] The Privileges and Immunities Clause argument raised by *amicus* Virginia Wineries Association is not properly before the Court: it was never raised by the Michigan plaintiffs and was excluded from the grant of certiorari in the New York case. For a similar reason, the argument of *amicus* Cargo Airline Association ("CAA") that § 601 of the Federal Aviation Administration Authorization Act (FAAAA), 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A), preempts Michigan's alcohol regulations should be rejected. *See* CAA Br. 12. This argument—which goes far beyond plaintiffs' discrimination argument and would condemn virtually all state laws governing alcohol importation—has never previously been raised in this case or in any of the direct-shipment litigation nationwide.

that a State's exercise of that authority is subject to greater judicial scrutiny than Congress itself receives when it legislates pursuant to the Commerce Clause.

Plaintiffs misdescribe this Court's first case interpreting the Twenty-first Amendment, *State Board of Equalization* v. *Young's Market Co.*, 299 U.S. 59 (1936), which established that States may discriminate against out-of-state alcohol. Contrary to plaintiffs' suggestion (Br. 26), the Court's opinion expressly recognized that the California law at issue (which the Court upheld) discriminated against out-of-state alcohol. California imposed a $500 license fee for the privilege of importing alcohol, and the Court noted that the State did not "exact[] an equal fee for the privilege of transporting domestic beer from its place of manufacture to the wholesaler's place of business."[7] Indeed, the California law was essentially the same as the laws struck down in *Tiernan* and *Walling*.[8] *Young's Market* upheld the California statute and thus effectively overruled *Tiernan* and *Walling*, because of the intervening adoption of the Twenty-first Amendment.

The Court's statement in *Young's Market* that the case did "not present a question of discrimination prohibited by the commerce clause," 299 U.S. at 62, read in context, did not mean that there was *no* discrimination, but rather that the statute's problems under the Commerce Clause went well beyond discrimination: the statute directly regulated interstate commerce by taxing importation and, under the *Case of the State Freight Tax*, 82 U.S. (15 Wall.) 232 (1872), *that* problem could not be remedied simply by equally burdening in-state beer. *See Young's Market*, 299 U.S. at 62. The Court, however, held that the Twenty-first Amendment eliminated *all* dormant Commerce Clause objections to stat-

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[7] The $750 fee cited by plaintiffs (Br. 26 n.10) applied to *manufacturers* of beer and was not analogous to the $500 fee imposed on *wholesalers* that imported out-of-state beer. *See Young's Market*, 299 U.S. at 64.

[8] *See Walling*, 116 U.S. at 454 (striking down $300 Michigan tax on persons selling alcohol imported from out-of-state); *Tiernan*, 102 U.S. at 127 (striking down $200 Texas tax on persons selling beer and wine manufactured out-of-state).

utes regulating alcohol importation. Indeed, the Court specifically rejected the contention that the Twenty-first Amendment gave States authority over importation yet prohibited discrimination: "To say that, would involve not a construction of the Amendment, but a rewriting of it." *Id.* at 62.

The Court's subsequent cases did not (as plaintiffs claim) merely "characterize *Young's Market* as affirmatively holding that 'discrimination against imported liquor is permissible.'" Br. 26. Both *Mahoney* v. *Joseph Triner Corp.*, 304 U.S. 401 (1938), and *Indianapolis Brewing Co.* v. *Liquor Control Commission of State of Michigan*, 305 U.S. 391 (1939), expressly *held* that the Twenty-first Amendment permits States to enact "clearly discriminat[ory]" laws. *Mahoney*, 304 U.S. at 403. Plaintiffs studiously avoid discussing the facts of these cases, and with good reason: *Mahoney* upheld a law that limited the importation of liquor stronger than 50 proof without limiting its in-state manufacture, 304 U.S. at 402-403, and *Indianapolis Brewing* upheld a statute that prohibited in-state dealers from selling any beer from Indiana or nine other States, 305 U.S. at 392. And there is absolutely no support for plaintiffs' assertion that the Court "characterized the law at issue [in *Indianapolis Brewing*] as nondiscriminatory." Br. 26 n.10. To the contrary, the Court upheld the law on the principle that "discrimination between domestic and imported intoxicating liquors . . . is not prohibited by the equal protection clause." 305 U.S. at 394.[9]

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[9] Plaintiffs highlight (Br. 13-14) the Court's opinion, written by Justice Jackson, in *H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525 (1949), which extolled the virtues of unrestricted interstate commerce, but nothing in that opinion contradicts the Court's contemporaneous view that alcohol was different. As then-Solicitor General Jackson stated in 1939, "[A]n exception was made to the generally exclusive power of Congress, and control of commerce between States in intoxicating liquors was handed back to the States of destination." Robert H. Jackson, *Trade Barriers—A Threat to National Unity*, in *Trade Barriers Among the States: The Proceedings of the National Conference on Interstate Trade Barriers* 75 (1939). Even legislation that discriminated to protect local interests, Jackson said, "is quite properly sustained by the Supreme Court." *Id.* at

Plaintiffs are equally wide of their mark in their interpretation of the Court's more recent decisions. Plaintiffs and *amici* repeatedly cite the Court's statement in *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964), that the Twenty-first Amendment did not repeal the Commerce Clause. Br. 21, 27. The Court was referring, however, to whether the Twenty-first Amendment repealed Congress's *affirmative* power under the Commerce Clause (something not at issue here). *See Hostetter*, 377 U.S. at 332 ("If the Commerce Clause had been *pro tanto* 'repealed,' then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor."). The Court strongly reaffirmed that the Twenty-first Amendment immunized state laws against *dormant* Commerce Clause challenges. *See id.* at 330.

In *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984), the Court struck down a discriminatory excise tax in Hawaii, but plaintiffs fail to explain the Court's basis for doing so. Neither Hawaii nor the Court could identify any justification for the difference in Hawaii's treatment of in-state and out-of-state alcohol other than protectionism. The tax, in other words, was "not supported by *any* clear concern of the Twenty-first Amendment," *id.* at 276 (emphasis added), and it thus failed rational-basis review. *Bacchus* never suggested that Hawaii's distinction between in-state and out-of-state alcohol triggered "strict scrutiny." Quite the opposite: the Court's actual holding was that state laws constituting "mere economic protectionism" are "not entitled to *the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor.*" *Id.* (emphasis added). A state law that draws a distinction between in-state and out-of-state alcohol that is related to the concerns of the Twenty-first Amendment is entitled to deference.[10]

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76; *see also Duckworth* v. *Arkansas*, 314 U.S. 390, 398-402 (1941) (Jackson, J., concurring in result).

[10] Plaintiffs also are wrong that Hawaii's excise tax was "obviously a regulation of the 'importation' of liquor into the State." Br. 29. The tax

Plaintiffs are also wrong to suggest (Br. 27) that *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U.S. 573 (1986), and *Healy* v. *Beer Institute, Inc.*, 491 U.S. 324 (1989), applied plaintiffs' "nondiscrimination" principle to strike down state alcohol regulations. *Brown-Forman* was not based on discrimination at all but on the fact that New York's regulation "directly regulate[d] interstate commerce." *Brown-Forman*, 476 U.S. at 582. In *Healy*, the Court found two Commerce Clause problems with the Connecticut price-affirmation statute: its extraterritorial "effect of controlling commercial activity occurring wholly outside the boundary of the State," *Healy*, 491 U.S. at 337, and its "discriminat[ion] against interstate commerce," *id.* at 340. The "discrimination," however, was not a distinction between in-state and out-of-state suppliers, and the Court did not cite *Bacchus*. It was an (apparently accidental) discrimination *among* entities that sold beer in Connecticut, penalizing those that also sold elsewhere (including in-state entities). *Id.* at 341. The ruling was consistent with the Court's theme that Connecticut could not project its regulatory regime into other States. Moreover, the Court held that the Connecticut statute fell outside the protection of the Twenty-first Amendment not because of the "discrimination" but only because of the extraterritorial effect. *See id.* at 342 ("Here, as in *Brown-Forman*, our finding of unconstitutional extraterritorial effects disposes of the Twenty-first Amendment issue.").[11] *Healy* thus leaves intact the Twenty-first Amendment's protection for a statute like Michigan's, which does *not* regulate liquor sales in other States.

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was imposed at wholesale, *after* liquor was imported, and was not an exercise of the core power to control physical importation.

[11] Justice Scalia, writing only for himself, stated that the statute's "discriminatory character eliminates the immunity afforded by the Twenty-first Amendment," 491 U.S. at 344, but as noted, the "discrimination" at issue was against firms that also did business out of state, not in favor of in-state suppliers.

Indeed, just one year after *Healy*, the Court in *North Dakota* upheld a state regulatory scheme that imposed special reporting and labeling requirements on alcohol importers and out-of-state distillers. *See* 495 U.S. at 428-429. Despite the facial distinction between in-state and out-of-state alcohol that North Dakota drew, the Court did not apply strict scrutiny. Instead, the Court upheld the labeling and reporting requirements because, in the words of the plurality opinion, they "f[e]ll within the core of the State's power under the Twenty-first Amendment," *id.* at 432, and they "unquestionably serve valid state interests," *id.* at 433.[12]

## III. MICHIGAN'S DISTINCTION BETWEEN IN-STATE AND OUT-OF-STATE DIRECT SHIPMENT IS REASONABLY CALCULATED TO ACHIEVE LEGITIMATE STATE INTERESTS.

Plaintiffs attempt to draw the Court into the minutiae of alcohol regulation, arguing that other regulatory rules could protect Michigan as well as its current system, and that Michigan's regime therefore does not meet strict scrutiny. But strict scrutiny is not the standard. The proper standard of review is rational-basis scrutiny, and Michigan's regime easily passes that test. As explained below, the distinction that Michigan draws between in-state and out-of-state direct shipping is rationally related to the temperance and tax collection goals of the Twenty-first Amendment. Michigan's regime may not be the only way to way to achieve those goals, but under the Twenty-first Amendment, it is a constitutionally protected way.

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[12] Plaintiffs distort the Seventh Circuit's holding in *Bridenbaugh*. The Indiana statute was for present purposes indistinguishable from Michigan's. *See* 227 F.3d at 851 (Indiana permits "local wineries, but not [out-of-state] wineries . . . to ship directly" to consumers). The Seventh Circuit upheld the statute because there was no "functional discrimination," *id.* at 853, since the law simply "ma[d]e alcohol from every source equally amenable to state regulation," which "is precisely what § 2 [of the Twenty-first Amendment] is for," *id.* at 854.

### A. Underage Drinking Is A Real Concern Posed By Direct Shipping.

Plaintiffs dismiss the concerns expressed by Michigan, the 33 other States that support Michigan, the National Conference of State Liquor Administrators, and the Michigan Association of Secondary School Principals, among others, about the effect on underage drinking if States should now lose their control over direct shipping.[13] The arguments of a financially interested California winery and a handful of Michigan oenophiles should not obscure the real concerns of those who deal with underage drinking on a daily basis.

The argument of plaintiffs that "[t]here is simply no evidence that . . . direct shipment would be a likely strategy for minors seeking to purchase liquor" (Br. 37) is false. In a Wirthlin survey, 35 percent of college students under 21 said they would be likely to purchase alcohol online if they could get away with it. C.A. App. 358. Indeed, minors are already having alcohol shipped to their homes. As plaintiffs note, one study showed that 10 percent of surveyed high-school seniors said they had used home delivery services to order alcohol. *See* Linda A. Fletcher et al., *Alcohol Home Delivery Services: A Source of Alcohol for Underage Drinkers*, 61 J. Studies on Alcohol 81, 82 (2000). That the participants in the survey ordered from local retail stores, not out-of-state suppliers, hardly helps plaintiffs' argument. It demonstrates that minors can wait for alcohol to be delivered, and in this age of overnight delivery services it hardly takes "several days" (Br. 37) to ship alcohol across the country.

Plaintiffs' argument that minors are unlikely to drink wine (Br. 37) is both wrong and irrelevant. It is wrong because about 13 percent of 12th graders (more than a quarter of the 12th graders who report drinking alcohol) say they

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[13] *See* Ohio and 32 Other States Br. 23-24; Mich. Ass'n of Secondary School Principals Br. 3-23; Nat'l Alcohol Beverage Control Ass'n Br. 11; Ill. Alcoholism and Drug Dependence Ass'n Br. 5-16.

have consumed wine in the past 30 days.[14] It is irrelevant because, as discussed below in Part IV, plaintiffs' position would logically require States to permit direct shipment not only of wine, but of beer and spirits as well.

The Federal Trade Commission ("FTC") staff report on which plaintiffs heavily rely does *not* show the "twenty-six States that permit direct shipping have encountered no . . . problems." Br. 36. That conclusion was based entirely on the responses of 11 states to a questionnaire sent by the FTC. *See* Staff of the FTC, *Possible Anticompetitive Barriers to E-Commerce: Wine* 31-34, App. B (July 2003) ("FTC Staff Report").[15] None of those 11 States, however, had conducted any active investigation, making the FTC staff's "finding" virtually worthless.[16] As explained by *amici*, the only real way to detect illegal sales to minors is through "stings," since neither minors nor retailers report illegal sales, and such sales otherwise come to light only by chance as States investigate crimes or traffic accidents that happen to be related to an illegal purchase. *See* Mich. Ass'n of Secondary School Principals Br. 11-12.

The States that have investigated the problem have found that alcohol can be purchased by minors over the Internet with alarming ease. Michigan, for example, con-

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[14] National Institutes of Health, *Monitoring the Future: National Survey Results on Drug Use, 1975-2003* (Aug. 2004), Vol. I, at 501, 512, *available at* http://www.monitoringthefuture.org/pubs/monographs/vol1_2003.pdf. Five percent of 12th graders reported drinking 5 or more glasses of wine in a row within the past two weeks. *Id.* at 513. Furthermore, the Fletcher study did not find that the illegal deliveries reported in that study "were mostly of keg beer." Br. 38. The study revealed only that retailers that delivered alcohol were more likely than other retailers to sell keg beer; it made no attempt to determine what alcohol those retailers sold to minors. *See* Fletcher, *supra*, at 83.

[15] *Available at* http://www.ftc.gov/os/2003/07/winereport2.pdf.

[16] North Dakota's response, for example, to the question "Have you had problems with out-of-state or in-state shippers shipping wine directly to minors?" was "No information." FTC Staff Report, *supra*, App. B. The State of Washington stated bluntly that out-of-state direct shipping "is a problem of concern" on a nationwide basis. *Id.*

ducted a series of stings, which revealed that one-third of the websites contacted allowed minors to purchase wine "with no more age verification than a 'click' of the mouse."[17] Massachusetts recently conducted a similar sting and discovered that underage college students were able to order beer, wine, and spirits from online retailers without having to verify their age. *See* Ohio and 32 Other States Br. 23.

### B. Out-Of-State Alcohol Suppliers Cannot Be Regulated As Effectively As In-State Suppliers.

When they stop trying to deny the dangers posed by direct shipping, plaintiffs fall back to a second argument: that the dangers posed by out-of-state direct shipping are no greater than the dangers of in-state direct shipping and that States therefore do not need to distinguish between in-state and out-of-state entities in order to address these dangers. Plaintiffs propose instead a permit system that would license out-of-state entities to ship directly to consumers. Such a system, however, would overwhelm state regulators and leave them without their most effective tool: the ability to put violators out of business.

Michigan can enforce its alcohol regulations by inspecting licensees, attaching their property, and putting violators out of business by revoking their licenses. Plaintiffs' suggestion that Michigan license out-of-state wineries would not give Michigan anything like the same real power over them. To begin with, Michigan has no way to limit the number of licenses it could be required to grant and no practical way to oversee the thousands of wineries that might ship directly to Michigan consumers. As the Second Circuit noted, "Requiring New York officials to traverse the country to ensure that direct sales to consumers (no matter how small) comply with New York law would render the regulatory scheme useless."

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[17] Irene M. Mead, State of Michigan's Remarks, Federal Trade Commission Workshop, *Possible Anti-Competitive Efforts to Restrict Competition on the Internet* (Oct. 8, 2002) 9-10, *available at* http://www.ftc.gov/opp/ecommerce/anticompetitive/panel/mead.htm; *see also* C.A. App. 322-327.

*Swedenburg* v. *Kelly*, 358 F.3d 223, 239 (2d Cir. 2004).[18] But even if Michigan could find some way to allocate a finite number of licenses without regard to location (*see* Br. 46), the cost of inspecting wineries as far away as California would be far higher, and plaintiffs cannot be serious in their suggestion (*see* Br. 43) that Michigan should have to depend on California to enforce *Michigan's* regulations against a California winery. Plaintiffs suggest Michigan could defray the higher inspection costs by imposing a higher fee for importation permits, but under plaintiffs' theory of the case, Michigan would have to justify its differential license fees under heightened scrutiny, since out-of-state licensees would inevitably pay more than in-state licensees.[19] Plaintiffs cannot have it both ways. Either Michigan has a right to draw rational distinctions between in-state and out-of-state entities or all such distinctions will end up in litigation.

Moreover, Michigan could threaten a noncompliant out-of-state winery only with the loss of its Michigan license, not with loss of its business. Plaintiffs effectively concede that this would be a less effective sanction and therefore argue that Michigan could instead rely on the federal Tax and Trade Bureau ("TTB") to revoke a noncompliant out-of-state winery's federal license, or could use the Twenty-first Amendment Enforcement Act ("TAEA"), 27 U.S.C. § 122a, to sue the winery in federal court. But neither is an effective substitute for state administrative control over entities

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[18] There is no support for plaintiffs' contention (Br. 43 n.19) that Michigan does not conduct inspections or searches of in-state wineries. The interrogatory cited by plaintiffs asked only what steps Michigan has taken "to enforce restrictions on deliveries to consumers" by in-state wineries. C.A. App. 100. Michigan said it had not taken any enforcement action regarding illegal deliveries (because there was no evidence of such deliveries), but Michigan cited other action that it had taken against in-state wineries (*see* D. Ct. Docket No. 54, Ex. 11, Attach. C), and it nowhere suggested that it does not inspect in-state wineries.

[19] None of the examples that plaintiffs cite in which Michigan charges differential fees based on the cost to the State in other regulatory areas (Br. 46) is analogous, since they all pertain to in-state entities; none involves Michigan charging higher fees to out-of-state entities as such.

with an in-state presence. The TTB has hardly "assured the States that will act on their complaints," as plaintiffs claim. Br. 46. In language omitted by plaintiffs, TTB said only that it "*could under appropriate circumstances* take administrative action." ATF Ruling 2000-1, *Direct Shipment Sales of Alcohol Beverages* (emphasis added).[20] Plaintiffs cite no case in which TTB has, in fact, acted on a State's complaint, and TTB denies any authority to take action against an out-of-state *retailer* that ships alcohol directly to a consumer. *See id.* More fundamentally, making enforcement of state laws dependent on federal officers is exactly what the framers of the Twenty-first Amendment did not want. As for the TAEA, there is no reported case in which a State has used it, and the statute hardly matches the deterrence provided by the threat of revoking an in-state entity's license in an administrative proceeding. The TAEA forces a State to litigate in federal courts across the country (to ensure personal jurisdiction), and the only remedy it provides is injunctive relief against further violations of the State's laws. *See* 27 U.S.C. § 122a.[21]

Michigan does, as plaintiffs note, currently license "outstate sellers of wine," Mich. Comp. Laws § 436.1109(9), but that system is not comparable to what plaintiffs propose, and it would not work for regulating direct shipping to consumers. Michigan currently licenses approximately 290 outstate sellers of wine (many of which are distributors that act as agents for numerous brands of wine) making enforcement much more manageable than under a licensing scheme involving thousands of wineries across the Nation. *See* C.A. App. 305-314. Furthermore, the current system allows licensees to ship into Michigan only through a limited number of in-state wholesalers, allowing Michigan regulators to match the records of the out-of-state seller against the re-

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[20] *Available at* http://www.atf.gov/alcohol/info/revrule/rules/2000-1.htm.

[21] *Cf. Swedenburg*, 358 F.3d at 239 n.13 (TAEA "while helpful to states, can only be used after a violation occurs. Under section 2, states have the authority to be proactive as well as reactive.").

cords of the in-state wholesaler to ensure that taxes are being collected and the State's other regulations are being respected. This Court has long recognized the importance of "localizing" alcohol sales in this manner.[22] Direct shipments of alcohol from thousands of wineries nationwide to an unlimited number of Michigan consumers would give the State no similar means of verifying regulatory compliance.

Michigan has also found that requiring a licensee with an in-state presence is important to revenue collection. Plaintiffs object to this but, ironically, 11 of the plaintiffs invoked the Fifth Amendment when asked whether they had paid the applicable Michigan taxes on alcohol they had ordered from unlicensed shippers. *See* C.A. App. 363, 372, 381, 386, 392, 399, 405, 423, 429, 435, 441. And plaintiffs' tax evasion is hardly exceptional. One complaint of the plaintiff wine buyers in *Bridenbaugh* was that Indiana's insistence on a state licensee would force them to pay Indiana taxes that California direct-shippers had not been collecting. 227 F.3d at 849-850. There may or may not be a legal problem in forcing out-of-state entities to collect and remit Michigan taxes, *cf.* Br. 41 n.17, *Quill Corp.* v. *North Dakota*, 504 U.S. 298 (1992); C.A. App. 325-355, but there is an obviously greater practical problem when a State has no effective capacity to audit an out-of-state shipper, which has no attachable property in the State and cannot be put out of business.

Finally, plaintiffs' argument that because other States permit some limited forms of direct shipping, the Constitution requires Michigan to do exactly the same is fundamen-

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[22] *See Heublein, Inc.* v. *South Carolina Tax Comm'n*, 409 U.S. 275, 282-283 (1972) ("There must be complete records of the quantities, brands, and prices involved at every stage of each liquor sale. By requiring manufacturers to localize their sales, [the State] establishes a check on the accuracy of these records. For example when a manufacturer can transfer its goods to a wholesaler in the State only after it submits an invoice showing the price and after it receives permission for the transfer, it is easier for the State to enforce its requirement that the wholesale price in [the State] be no higher than that elsewhere in the country. The requirement that sales be localized is, unquestionably, reasonably related to the State's purposes . . . .").

tally inconsistent with the Twenty-first Amendment principle that the choice belongs to each State. The Nation's history of alcohol regulation is that what is desired, or works, in one State may not be suitable for another. And more fundamentally, this case is not about whether all States should adopt some uniform regime of exceptions, but whether States can broadly require all importation to be done by licensed entities with a substantial in-state presence. That is the requirement that the court of appeals struck down.

## IV. PLAINTIFFS' READING OF THE CONSTITUTION WOULD DESTROY THE "UNQUESTIONABLY LEGITIMATE" THREE-TIER SYSTEM.

Plaintiffs (wine consumers and one California winery) did not bring this case to eliminate the exception that allows a small number of licensed Michigan wineries to ship directly to their customers. Their objective, in which they succeeded at the Sixth Circuit, was to break down the requirement that all beverage alcohol go through in-state licensees, and their success would undo the three-tier system for regulating beverage alcohol. MB&WWA Br. 39-40. Plaintiffs do not deny this crucial point.

State control over the distribution of beverage alcohol *depends* on the principle that States may require out-of-state entities to sell through licensed in-state entities, even though the requirement is inherently "discriminatory" in the sense in which plaintiffs use that term. The system was conceived as an alternative to establishing state monopolies for the sale of alcoholic beverages in the post-Repeal era. *See* Wine & Spirits Wholesalers of Am. Br. 8-12. States found that they could achieve the benefits of a monopoly system without the burdens if they limited the right to traffic in alcoholic beverages to in-state entities known to, and licensed by, local officials. *Id.* at 10-11. Out-of-state manufacturers were free to introduce their products into the State, but only through the state-monitored three-tier system. *Id.*

Plaintiffs' interpretation of the Twenty-first Amendment would render the three-tier system subject to "strict scrutiny" and almost certainly unconstitutional. The three-

tier system permits only in-state wholesalers to sell to in-state retailers. *See North Dakota*, 495 U.S. at 447 (Scalia, J., concurring in judgment). Under plaintiffs' novel and ahistorical "nondiscrimination" principle, this requirement would constitute facial discrimination. States would have to defend it under strict scrutiny, with the predictable result that the States would be required to allow any wholesaler anywhere to sell to in-state retailers.

Plaintiffs' principle would not stop there. Since Michigan allows in-state retailers to ship alcohol directly to in-state consumers, *see* Mich. Comp. Laws § 436.1203, plaintiffs' nondiscrimination principle would require Michigan to allow out-of-state retailers to ship alcohol directly to the State's consumers, or face strict scrutiny for not doing so. Even a State that barred all direct shipping would be open to the charge of discrimination, since only in-state retailers could sell directly to consumers. Such a State would have to defend its decision under heightened scrutiny, and plaintiffs' brief lays the groundwork for such a challenge, arguing that an in-state presence is not necessary for entities selling alcohol directly to consumers. *See, e.g.*, Br. 38 (minors "far more likely" to obtain alcohol illegally from in-state retailers than via direct shipping); Br. 41 (Michigan can protect tax revenues via permit system for direct shippers). Such a challenge would include all forms of alcohol sold by in-state retailers, and thus would open up the States to shipments of beer and spirits as well.

There is no stopping point short of the destruction of the three-tier system. Plaintiffs' principle would usher in an unrestricted national market in mail-order beverage alcohol—something that would shock the legislators who drafted the Amendment, who thought they had ensured that States would never again be powerless, as they were after *Bowman* and *Rhodes*, to regulate the direct shipment of beverage alcohol to their residents.

## CONCLUSION

The judgment of the United States Court of Appeals for the Sixth Circuit should be reversed.

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# Supreme Court of the United States

JUANITA SWEDENBURG, *et al.*,

*Petitioners,*

v.

EDWARD D. KELLY, *et al.*,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## PETITIONERS' REPLY BRIEF ON THE MERITS

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***In vino veritas.***

– Pliny (A.D. 23-79)

## ARGUMENT

### I. NEW YORK'S DISCRIMINATORY AND PROTECTIONIST DIRECT SHIPPING BAN CONSTITUTES A *PER SE* VIOLATION OF THE COMMERCE CLAUSE.

Implicitly confessing a Commerce Clause violation, respondents and their *amici* state that this case would be different if it involved a commodity other than alcohol. In fact, this case is before the Court because it does *not* involve alcohol generally, but wine specifically.

That is because a majority of states, including New York and Michigan, have chosen to regulate wine distinctively, with a significant majority now allowing some direct shipping of wine (but not other types of alcohol) directly to consumers. The reasons for allowing direct shipping of wine are numerous and varied. Unlike other types of alcohol, varieties are infinite and distinct, and direct shipping is necessary to facilitate consumer choice. Wine is now produced in all 50 states, many of which (including New York) wish to promote their local wine industries. Direct shipping of wine does not seriously implicate concerns about underage access. And some states view direct shipping as a means of generating tax revenues. *See* Federal Trade Comm'n, *Possible Anticompetitive Barriers to E-Commerce: Wine* (July 2003).

Among the majority of states that have chosen to treat wine distinctively for purposes of direct shipping, only a handful – including New York and Michigan – have chosen to discriminate, by freely allowing intrastate direct shipping while prohibiting it to out-of-state wineries. These

consolidated cases are not an attack on the three-tier system of alcohol distribution, which will remain intact regardless of the outcome of this lawsuit; nor do they seek unregulated traffic in wine. Rather, they seek only to confine the State to regulate the direct shipment of wine by one set of rules, not two.

A. Despite respondents' obfuscatory efforts, New York's direct shipment regulatory scheme blatantly discriminates.[1] No license is available for out-of-state wineries to ship directly to New York consumers (2d Cir. J.A. 306-46; *House of York v. Ring*, 322 F. Supp. 530, 533 (S.D.N.Y. 1970)).

The general counsel of the State Liquor Authority sets forth a cumbersome system by which out-of-state wineries theoretically may open a New York winery and warehouse, obtain a retailer license, and ship wine in vehicles owned by the winery or licensed by the State (2d Cir. J.A. 159-60).[2] The process is so convoluted that no winery ever has even attempted it (*id.* at 159). For the vast majority of wineries that are small, the burdens are Sisyphean. That is why this Court consistently has recognized that in-state

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[1] For a thorough discussion of New York's regulatory scheme and its effects upon in-state and out-of-state wineries, *see* Amicus Br. of Millbrook Vineyards & Winery.

[2] The State, apparently disavowing the testimony of its own witness, here for the first time suggests that other alternatives may be available (State Br. at 8). This appears to be an 11th-hour conversion, for previously the State consistently informed out-of-state wineries that no options existed for direct shipping (2d Cir. J.A. 306-46). In any event, such theoretical assurances late in the appellate process are unconvincing. As this Court admonished in a similar context in *Brown-Forman Distillers Corp. v. N.Y. St. Liquor Auth.*, 476 U.S. 573, 583 n.5 (1986), "The protections afforded by the Commerce Clause cannot be made to depend on the good grace of a state agency."

business operations requirements constitute *per se* violations of the Commerce Clause. *See, e.g., Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970); *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963); *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951); *Ward v. Maryland*, 79 U.S. 418 (1870).

Even if a viable physical presence option existed, the playing field still is not level. The State (Br. at 39-40) tries to equate the various in-state direct shipping options. But as the chart at p. 28 of our opening brief illustrates, by far the easiest direct shipping opportunities (*e.g.*, no retailer license necessary, no second facility requirement, use of common carriers permissible) are limited on the face of the statutes to New York farm wineries (ABC Law §76-a(6)(d)), which are limited to New York wine products. Such a discriminatory system presents a classic *per se* Commerce Clause violation. "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry." *Brown-Forman*, 476 U.S. at 579.

B. In *Healy v. The Beer Inst.*, 491 U.S. 324, 340-41 (1989), the Court reiterated its "consistent practice of striking down state statutes that clearly discriminate against interstate commerce (citations omitted), unless that discrimination is *demonstrably justified by a valid factor unrelated to economic protectionism*" (emphasis added). In *Bacchus Imports v. Dias*, 468 U.S. 263, 270 (1984), the Court ruled that a finding of economic protectionism "may be made on the basis of either discriminatory purpose, or discriminatory effect." Both are here in abundance.

Respondents ignore the extensive record evidence of protectionist intent in multiple contexts: when the legislature extinguished direct interstate shipping options in 1970; when the legislature enacted the farm winery exemption for the express benefit of New York wineries; and when the governor vetoed direct interstate shipping legislation in 1995. *See* Opening Br. 3-5. *See also* Amicus Br. of George A. Akerlof, *et al.*, in No. 02-1116 (brief of Nobel laureate economists); Riekhof and Sykuta, "Regulating Wine by Mail," *Regulation* 30, 36 (Fall 2004) (empirical study finding that "economic interests in both the private and public sectors are the principal drivers of restrictions on direct interstate shipping of wine"). Indeed, in the district court, the State's then-candid counsel acknowledged that the direct shipping exemptions for New York wineries were aimed at promoting the State's domestic wine industry (Pet. App. 54a-55a). As in *Bacchus*, the Court does not have to guess about the motives underlying New York's discriminatory direct shipping regime.

C. Independent of its facial discrimination, the law is discriminatory in effect. *See Brown-Forman*, 476 U.S. at 592 (Stevens, J., dissenting) ("there should be ample evidence available to a concerned litigant to prove that this consequence has in fact developed"). While nearly every New York winery avails itself of direct shipping (Jt. App. 42-43), only a fraction of the tens of thousands of out-of-state wine labels are available to New York consumers (Jt. App. 187-89; 2d Cir. J.A. 3547-50, 3554-55, 3578-82, 3595). On a national scale, the Federal Trade Commission has found that bans on direct shipping limit consumer choice and raise prices. *See* FTC Study, *supra*. *See also* Jt. App. 38-39, 186-87; 2d Cir. J.A. 3578; Amicus Br. of Goldwater Inst. in No. 03-1116 at 12. The bans also adversely

impact the cargo transport industry, which depends upon uniform rules for national commerce, *see* Amicus Br. of Amer. Cargo Ass'n in No. 03-1116; as well as the vast potential of the Internet to enhance consumer choices. *See* Amicus Br. of Amer. Homeowners Alliance, *et al.*, in No. 03-1116.

D. The State easily could satisfy legitimate regulatory interests by making them "licensed and accountable" by conditioning direct shipping upon a permit,[3] as other states successfully have done. Amicus Br. of Calif. *et al.* in No. 03-1116 at 19-20.[4] Not only do States now have authority under the 21st Amendment Enforcement Act, 27 U.S.C. §122a, to enforce in their home federal courts any violations of valid laws against out-of-state wineries, but the federal government has power to revoke a winery's license for violating state laws under the Federal Alcohol Administration Act, 27 U.S.C. §204(d). As a consequence, the FTC reports no enforcement problems in states that allow direct interstate shipping. *See* FTC Study at 26-39; *see also* Amicus Br. of Wine Institute in No. 03-1116 (outlining nondiscriminatory alternatives). Given that New York imposes *no* regulations on intrastate direct shipping and the legislative history in the record reveals few such

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[3] The New York State Liquor Authority already has authority to provide permits for entities not encompassed by the liquor statutes (ABC Laws §105-9; Pet. App. 98a).

[4] As those States also point out (Br. at 2-3 and 10-14), it is inconsistent for respondents to argue that the 21st Amendment allows the greater power of discrimination but not the lesser power of evenhanded taxation. Indeed, states have wide latitude for nondiscriminatory taxation under the 21st Amendment. *See Heublein, Inc. v. S.C. Tax Comm'n*, 409 U.S. 275 (1972). And, in fact, States that choose to do so successfully collect taxes on indirect wine shipments. *See, e.g.*, FTC Study at 38-40.

concerns, its post hoc rationalizations of its discriminatory regime ring hollow.

## II. THE WILSON ACT, WEBB-KENYON ACT, 21st AMENDMENT, AND THIS COURT'S JURISPRUDENCE ALL EMBRACE THE PRINCIPLE OF NONDISCRIMINATION.

Instead of meeting their burden of demonstrating that the discriminatory regime is "demonstrably justified by a valid factor unrelated to economic protectionism," *Healy*, 491 U.S. at 341, respondents have chosen to ignore this Court's "wise reluctance to wade into the complex currents" underlying the enactment of the 21st Amendment. Cutting to the chase of their argument, New York dismisses *Bacchus* as an anomaly (State Br. at 28); while the liquor distributor respondents, along with Michigan and their state *amici*, candidly call on the Court to overturn it (Priv. Resp. Br. at 26 n. 8; Amicus Br. of Ohio, *et al.* in No. 03-1116 at 2; Mich. Br. in No. 03-1116 at 28). They press upon this Court an argument it has never accepted: that State authority under the 21st Amendment is plenary; or, as their state *amici* put it, that "the dormant Commerce Clause simply does not apply." Ohio Br. at 2.

Respondents' argument would sweep away not only *Bacchus*, but all of this Court's jurisprudence, beginning with *Hostetter v. Idelwild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964), that harmonizes the Commerce Clause and 21st Amendment. Nothing would be left of the Commerce Clause in this context were the State allowed to rationalize even nakedly protectionist legislation within the ambit of its 21st Amendment powers. And if the Commerce Clause is so devoid of vitality, from where does Congress derive its power to regulate alcohol, as this

Court has sustained it in such cases as *Calif. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) and *Capital Cities Cable v. Crisp*, 467 U.S. 691 (1984)?

In reality, no such evisceration of the Commerce Clause is manifest in either the 21st Amendment or the Webb-Kenyon Act. To prove otherwise, respondents face a high hurdle. "[B]ecause of the important role the Commerce Clause plays in protecting the free flow of interstate trade, this Court has exempted state statutes . . . only when the congressional direction to do so has been 'unmistakably clear'." *Maine v. Taylor*, 477 U.S. 131, 138-39 (1986); *accord*, *Wyoming v. Oklahoma*, 502 U.S. 458 (1992) ("Congress must manifest its unambiguous intent before a federal statute will be read to permit or to approve such a violation of the Commerce Clause"). A full contextual review of those enactments, buttressed by this Court's jurisprudence for the better part of two centuries, shows that far from unambiguously jettisoning the nondiscrimination principle at issue here, they fully embrace it.

A. Despite the twists and turns of jurisprudence and congressional enactments concerning alcohol over the past two centuries, two complimentary core principles have endured to this day: that State power is bounded by the police power and by the rule of nondiscrimination.

Early cases afforded states wide latitude to regulate or prohibit alcohol, provided the laws constituted "a legitimate exertion of the police powers." *Mugler v. Kansas*, 123 U.S. 623, 661 (1887); *accord*, *License Cases*, 46 U.S. 504, 582 (1847). The Court in *Tiernan v. Rinker*, 102 U.S. 123, 126 (1880), held that a license fee on alcohol is valid only if nondiscriminatory, observing that the object of

the Commerce Clause is "to insure this uniformity against discriminating State legislation."

Hence, in *Walling v. Michigan*, 116 U.S. 446, 460 (1886), a unanimous Supreme Court invalidated a discriminatory state tax imposed upon the privilege of selling alcohol. The State asserted such regulation was a permissible exercise of the police power, but the Court disagreed, declaring that "[t]his would be a perfect justification of the act if it did not discriminate against the citizens and products of other States." *Id.* at 460. In other words, the police power simply does not encompass the power to discriminate against interstate commerce.

Subsequent cases began to limit state authority over alcohol in interstate commerce, thereby conferring an advantage to interstate over intrastate commerce, leaving only the latter subject to regulation under the police power. In *Bowman v. Chic. & N.W. Railway Co.*, 125 U.S. 465 (1888), the Court struck down a dry state's prohibition of interstate transportation of alcohol, holding that absent express congressional authorization, such interstate commerce was immune from state regulation. Dissenting, Justice Harlan, citing *Walling*, argued that such regulation was valid so long as it did not discriminate against interstate commerce. *Id.* at 517-518 (Harlan, J., dissenting). In *Leisy v. Hardin*, 135 U.S. 100 (1890), the Court extended immunity to sales to residents in unopened packages. Justice Gray dissented, again distinguishing the case from *Walling* because the law treated interstate and intrastate commerce equally. *Id.* at 152 (Gray, J., dissenting).

Congress responded in 1890 by enacting the Wilson Act, which extinguished the immunity attaching to interstate

commerce. The debates focused on overturning *Bowman* and *Leisy*; no disapproval whatsoever was expressed of *Walling* or the nondiscrimination principle.[5] To the contrary, the law provided that

> [all] . . . intoxicating liquors . . . transported into any State or Territory . . . shall upon arrival . . . be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, *to the same extent and in the same manner as though such . . . liquors had been produced in such State or Territory*. . . .

27 U.S.C. §121 (emphasis added).

In so doing, Congress expressly preserved both the police power limitation, which precludes discrimination, and the nondiscrimination principle. Subsequent cases so held. In *In re Rahrer*, 140 U.S. 545, 554 (1891), the Court upheld the constitutionality of the Wilson Act, holding that state laws were valid where passed "legitimately for police purposes." In confronting *Bowman* and *Leisy*, the Court observed, "Congress has now spoken, and declared that imported liquors . . . shall, upon arrival in a State, fall within the category of domestic articles of a similar nature." *Id.* at 560. Even more to the point, the Court in *Scott v. Donald*, 165 U.S. 58 (1897), struck down a law that limited the sale of alcohol to in-state producers. Under the Wilson Act, the Court held, "equality or uniformity of treatment under state law was intended." *Id.* at

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[5] For two thorough treatments of the legislative history of the Wilson Act, the Webb-Kenyon Act, and the 21st Amendment, *see* Amicus Br. of DKT Liberty Project and Amicus Br. of Napa Valley Vintners, both in No. 03-1116.

100. In language directly on point to the present case, the Court declared that under a State's police power,

> a law may forbid entirely the manufacture and sale of intoxicating liquors and be valid. Or it may provide equal regulations for the inspection and sale of all domestic and imported liquors and be valid. But the State cannot, under the Congressional legislation referred to, establish a system which, in effect, discriminates between interstate and domestic commerce. . . .

*Id.*

The Court proceeded to strike down a pair of laws forbidding direct interstate shipments of wine for personal use, holding they were an invalid regulation of interstate commerce. *Rhodes v. Iowa*, 170 U.S. 412 (1898); *Vance v. W.A. Vandercook Co.*, 170 U.S. 438 (1898). Dissenting and citing *Scott* approvingly, Justice Gray admonished that such regulations were within the States' police power so long as they did not discriminate against interstate commerce. *Rhodes*, 170 U.S. at 431-35 (Gray, J., dissenting).

Congress acted to remove the immunity "in certain cases," enacting the Webb-Kenyon Act, 27 U.S.C. §122, which overturned *Rhodes* and *Vandercook*. Again, the legislative history is bereft of any intent to disturb the venerable nondiscrimination principle.[6] In sustaining the

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[6] Construing the Webb-Kenyon Act not to shield a discriminatory liquor purchase law, the South Carolina Supreme Court applied *Scott* in holding that the act eliminated immunity "of only valid state laws. It was not intended to confer and did not confer upon any state the power to make injurious discriminations against the products of other States."

(Continued on following page)

act's constitutionality, the Court in *Clark Distilling Co. v. Western Md. Railway Co.*, 242 U.S. 311, 318 (1917), applied the act to sustain a nonimportation law that forbade "all shipments . . . whether from within or without the State." The Court explained that Webb-Kenyon "was enacted simply to extend that which was done by the Wilson Act," *i.e.*, to "prevent the immunity characteristic of interstate commerce" from affording "a means by subterfuge and indirection" to thwart valid State laws. *Id.* at 324. Thus the Wilson and Webb-Kenyon Acts established the dual cornerstones of state regulation that persist to this day: broad State authority to regulate alcohol pursuant to its police powers and subject to the rule of nondiscrimination.

Passage of the 18th Amendment nationalized what previously was primarily a state issue. Though the legislative history of the 21st Amendment is often contradictory, two points are beyond dispute: (1) nowhere does it disturb the continuing vitality of cases like *Walling* and *Scott* or the nondiscrimination principle they embody; and (2) the 21st Amendment embraced and constitutionalized the Wilson and Webb-Kenyon Acts, and restored the status quo ante.[7] *Craig v. Boren*, 429 U.S. 190, 205 (1976). For good measure, Congress subsequently re-enacted the

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*Brennan v. So. Express Co.*, 90 S.E. 402, 404 (S.C. 1916). Respondents cite no cases to the contrary.

[7] *See* DKT Liberty Amicus Br. at 21-29; Napa Valley Vintners Amicus Br. at 18-26. As those briefs demonstrate, the rejection of the proposed §3 of the amendment, pertaining to concurrent federal authority to regulate saloons, did not indicate congressional intent to divest itself of regulatory authority over alcohol, but rather to preserve traditional State authority over saloons.

Webb-Kenyon Act because its constitutionality, absent congressional re-authorization, was in dispute.

Applying the newly enacted amendment in *State Board of Equalization of California v. Young's Market Co.*, 299 U.S. 59, 61 (1936), the Court upheld a license fee for alcohol importation that was "the same whether the beer to be sold is imported or domestic."[8] The Court emphasized the narrowness of its decision, observing that the plaintiffs contended that to sustain the license fee would require construing the 21st Amendment as having "freed the States from all restrictions upon the police power to be found in other provisions of the Constitution. The question for decision requires no such generalization." *Id.* at 64.

Purporting to apply *Young's Market*, the Court upheld discriminatory legislation with cursory analysis in a trio of cases in 1938-39. *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938); *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391 (1939); *Joseph F. Finch & Co. v. McKittrick*, 305 U.S. 395 (1939). Indeed, the Court went so far as to hold in *Indianapolis Brewing*, 305 U.S. at 394, that a State's 21st Amendment powers are unbounded even by the Equal Protection Clause – a proposition that subsequently has been completely repudiated. *See Craig v. Boren*, *supra*; *accord Midcal*, 445 U.S. at 108.

But the Court immediately returned to an approach that balanced competing constitutional interests. In *William Jameson & Co. v. Morgenthau*, 307 U.S. 171 (1939), the Court rejected a challenge to the labeling provisions of the federal Alcohol Administration Act,

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[8] Indeed, the Court observed that in-state brewers actually were charged a higher fee. *Id.* at 64.

expressly disavowing the plenary authority argument respondents press here. The law was attacked on the ground that the 21st Amendment "gives to the States complete and exclusive control over commerce in intoxicating liquors. . . . We see no substance in this contention." *Id.* at 173. And in sustaining a state law that channeled alcohol traffic through prescribed mechanisms, the Court in *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939), emphasized the state's "police authority" to adopt "reasonably appropriate" alcohol regulations, noting that the state law at issue "creates no discrimination against interstate commerce. It is subjected to the same regulations as those applicable to intrastate commerce." *Id.* at 140.

Hence, when the Court in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 329 (1964), faced the question whether, as respondents here assert, the 21st Amendment "obliterates" the Commerce Clause, it construed narrowly its prior rulings and soundly rejected the notion. To this "absurd oversimplification," the Court observed that if "the Commerce Clause had been *pro tanto* 'repealed,' then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect." *Id.* at 332. Instead, the Court admonished, "[B]oth the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. . . . [E]ach must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." *Id.*

Thus in *Midcal*, 445 U.S. at 106, which pitted the exercise of congressional authority under the Commerce Clause against a State's 21st Amendment core power, a unanimous Court ruled that the "national policy in favor of

competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." In *Capital Cities*, 467 U.S. at 713-714, the Court likewise balanced federal Commerce Clause powers against 21st Amendment interests, striking down a state alcohol advertising regulation.

It is within this solid tradition that *Bacchus* fits.[9] The proper approach under *Bacchus* and this Court's other 21st Amendment cases, therefore, is to query whether in a particular case "the principles underlying the Twenty-first Amendment are sufficiently implicated . . . to outweigh the Commerce Clause principles that would otherwise be offended," 468 U.S. at 275; and to eschew economic protectionism, *id.* at 276, and the discrimination that renders it apparent. *Id.* at 270. *Bacchus* thus endorsed and reaffirmed the same nondiscrimination principle that this Court had applied for nearly all of the previous century.

The Court applied *Bacchus* in *Brown-Forman*, 476 U.S. at 585, holding that a price affirmation statute, defended as an exercise of the State's core 21st Amendment powers, "on its face violates the Commerce Clause, and is not a valid exercise of New York's powers under the Twenty-first Amendment." In *Healy*, 491 U.S. at 339-340, the Court likewise struck down a price affirmation statute under the Commerce Clause both because of its extraterritorial effect *and* because it was discriminatory. Though the State had a legitimate interest in securing lower prices, the Court held that that policy "is not advanced by . . . exempting brewers and shippers engaging in solely domestic sales." *Id.* at 341;

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[9] This Court subsequently affirmed that *Bacchus* did not change that law but rather "applie[d] legal rules already decided" in holding that it should have retroactive effect. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 534 (1991) (Opinion of Souter, J.).

*see also id.* at 344 (Scalia, J., concurring) (the statute's invalidity "is fully established by its facial discrimination against interstate commerce . . . and by [the State's] inability to establish that the law's asserted goal of lower consumer prices cannot be achieved in a nondiscriminatory manner").

Finally, if Congress or this Court has conferred power upon States to discriminate, one entity to which that clearly would come as a surprise is Congress. In enacting the 21st Amendment Enforcement Act, 27 U.S.C. §122a, to answer the states' call for additional regulatory authority to police interstate commerce over alcohol, Congress in subsection (e) expressly limited such authority to "a valid exercise of power" under the 21st Amendment as it "is interpreted by the Supreme Court . . . including interpretations in conjunction with other provisions of the Constitution." 27 U.S.C. §122a(e). Legislative history makes clear that the law's framers understood the applicable provisions to include the dormant Commerce Clause and its rule of nondiscrimination as applied by *Bacchus*. *See, e.g.*, 146 Cong. Rec. S10197 (daily ed. Oct. 11, 2000) (Statement of Sen. Hatch) ("this bill does not, even unintentionally, somehow change the balancing test employed by the Courts in reviewing State liquor laws); 106 Cong. Rec. S10214-15 (daily ed. Oct. 11, 2000) (Statement of Sen. Feinstein) (applying *Hostetter* and *Bacchus* to the effect that "the 21st Amendment cannot be used by the States to justify liquor laws which, by favoring instate businesses, discriminate against out-of-state sellers"). *See also* Amicus Br. of Members of the U.S. Congress in No. 03-1116 at 20-21.

In sum, the principle of nondiscrimination is deeply embedded in the common law notion of police power, in

over 150 years of jurisprudence, and in the affirmative exercise of congressional power under the Commerce Clause. The Court should continue to honor that principle here.

## III. A DECISION ALLOWING DISCRIMINATION WOULD COLLIDE WITH OTHER CONSTITUTIONAL GUARANTEES.

All parties agree that whatever its effect on the Commerce Clause, the 21st Amendment leaves intact all other constitutional guarantees. Rather than answer the argument, respondents urge the Court to ignore other constitutional provisions, especially the privileges and immunities clause, that plainly would proscribe discriminatory treatment against out-of-state entrepreneurs. *See* Amicus Br. of Va. Wineries Ass'n.

In fact, the Court has considered the Commerce Clause in construing the Privileges and Immunities Clause even where it was not raised in a case. *See, e.g., Hicklin v. Orbeck*, 437 U.S. 518, 531-32 (1978). That makes abundant sense given that a number of constitutional guarantees, including the Commerce Clause, Privileges and Immunities Clause, and Equal Protection Clause, all "are united by a common theme and focused on a single underlying evil: the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want." Sunstein, "Naked Preferences and the Constitution," 84 *Colum. L. Rev.* 1689, 1689 (1984); *see also id.* at 1709 ("The basic themes of the [Privileges and Immunities Clause] are almost identical to those of the dormant commerce clause").

Likewise, the Court would do well to take account of the nondiscrimination command of the Privileges and Immunities Clause in construing the proper lines of demarcation between the Commerce Clause and the 21st Amendment. In so doing it will find further imperative for preserving and applying here the principle of nondiscrimination.

## IV. THE PROPER REMEDY IS TO EXTEND REGULATED DIRECT SHIPPING ON NONDISCRIMINATORY TERMS.

The district court fashioned the appropriate remedy, opening direct shipping to out-of-state wineries on the same terms and conditions as in-state wineries (Pet. App. 72a-73a). The liquor distributor respondents argue instead that the Court should strike provisions that make in-state shipping lawful.[10] Such a remedy would be a jackpot for the liquor distributors: even in losing their case, their oligopoly over alcohol distribution would be made absolute, a perverse result in a case that seeks to vindicate consumer freedom and eradicate economic protectionism.

The question of remedy, however, is not before the Court. The Court granted review only on the threshold merits question of whether a State's discriminatory treatment of direct shipment of wine violates the Commerce

[10] That the farm winery exemption has a severance clause is of no moment: either remedy requires the Court to sever something, either the challenged exclusion of interstate shipping or the in-state exemptions. The New York ABC laws are so riddled with favoritism for New York wineries that finding and severing them all would require an exacting search.

Clause. Hence, the issue has not been fully briefed before this Court.

In any event, such a remedy also would violate the general principle that where a provision is unconstitutional because its benefits are under-inclusive, "extension, rather than nullification, is the proper course." *Califano v. Wescott*, 443 U.S. 76, 89-90 (1979); *see also Kassel v. Consolidated Freightways*, 450 U.S. 662 (1982) (in Commerce Clause challenge to limit on truck size that included intrastate exemptions, proper remedy was to strike ban).

An equally compelling reason to avoid the liquor distributors' proposed remedy is that it would create, by judicial fiat, a new crime, given that violation of the ABC laws comprises a criminal misdemeanor. The scores of New York wineries who today lawfully ship directly to consumers would be committing a criminal offense. Courts should not choose a remedy whose effect is to transform an act made lawful by the legislature into a criminal act,[11] for "the discretion to . . . define criminal offenses and prescribe punishments, resides wholly with state legislatures." *Schall v. Martin*, 467 U.S. 253, 268 n.18 (1984). *Accord*, *United States v. Bajakajian*, 524 U.S. 321, 336 (1998) (judgments about defining criminal offenses and punishments belong to the legislature); *Bousely v. United States*, 523 U.S. 614, 621 (1998) (only the legislature, not the courts, can make conduct criminal); *Hutto v. Davis*,

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[11] Indeed, in 1995, the Legislature overwhelmingly approved direct interstate shipping legislation, only to have it vetoed by the governor (2d Cir. J.A. 442-444, 450-52). Such action, along with its creation of in-state direct shipping, evidences a clear legislative preference for inclusion, rather than for extinguishing a vital economic opportunity for New York wineries.

454 U.S. 370, 371 (1982) (defining what conduct constitutes a crime is a basic line-drawing process within the province of the legislature, not the courts). The proper remedy is to extend the direct shipping opportunity on equal terms, precisely as the district court did.

## CONCLUSION

On multiple occasions over the past 40 years, this Court has rejected State efforts to invoke the 21st Amendment to cleanse their constitutional sins. New York here persists in arguments it has made repeatedly over that same period to shield economic protectionism from constitutional scrutiny. *See Hostetter*, *supra*; *Brown-Forman*, *supra*; *Loretto Winery, Ltd. v. Gazzara*, 601 F. Supp. 850 (S.D.N.Y.), *aff'd sub nom.*, *Loretto Winery, Ltd. v. Duffy*, 761 F.2d 140 (2d Cir. 1985) (striking down discriminatory statute authorizing sale of certain domestic alcohol in grocery stores). The holding in those cases should be the same here: the 21st Amendment, broad though the powers it confers upon states may be, provides no sanctuary for economic protectionism.

Respectfully submitted,

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No. 03-1116, No. 03-1120

IN THE

# Supreme Court of the United States

JENNIFER M. GRANHOLM,
*Petitioner*,
v.
ELEANOR HEALD, *et al.*,
*Respondents*.

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,
*Petitioner*,
v.
ELEANOR HEALD, *et al.*,
*Respondents*.

**On Writ of Certiorari the United States Court of Appeals for the Sixth Circuit**

## BRIEF OF GEORGE A. AKERLOF, DANIEL L. MCFADDEN, VERNON L. SMITH, DONALD J. BOUDREAUX, ROBERT W. HAHN, JOHN M. LETICHE, AND ROBERT E. LITAN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS ELEANOR HEALD *ET AL.*

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## QUESTION PRESENTED

Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of Sec. 2 of the Twenty-first Amendment?

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## INTEREST OF AMICI CURIAE

This *amicus curiae* brief is submitted by a group of economists in support of respondents Eleanor Heald *et al.* (cases 03-1116 and 03-1120). The individual signatories on this brief are leading economics scholars whose contributions to the study of consumer markets have enjoyed national and international recognition and acclaim.

George A. Akerlof is Professor of Economics at the University of California at Berkeley and 2001 Nobel Laureate in Economics.

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The economists were assembled by the Henry Wine Group, a for-profit corporation domiciled in California.[1] The Henry Wine Group is the largest importer, distributor, and broker in the United States dealing exclusively in fine wines. The firm's business model, which emphasizes quality services to suppliers

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[1] No party authored this brief in whole or in part, and no person except amicus Henry Wine Group made a monetary contribution to the preparation and submission of this brief. See S. Ct. R. 37.6.

and customers, rests on the recognition that the special needs of fine wine suppliers and their customers are not being met by the dominant, spirits-driven wholesale distributors. Protectionist state regulations constitute a significant obstacle to the Henry Wine Group's growth and market penetration outside California.

For many years, the company's leading officers have played an active role in a national campaign against antiquated and inefficient wine marketing restrictions. In their experience, economic considerations and, in particular, the consumer benefits that would likely flow from a more open wine market have often received too little recognition in a debate where regulatory concerns, interest group politics, and weighty constitutional questions all intersect. Accordingly, the Henry Wine Group asked the signatories to provide a fuller picture of the wine market and its regulatory environment, which may be powerfully affected by these cases. We claim no constitutional expertise, and we submit this brief entirely in our capacity as economists and on the economic background and implications of the direct shipment regulations here at issue. All parties have consented to the filing of this brief.

## SUMMARY OF ARGUMENT

Throughout the United States, wine is commonly sold under a "three-tier" system: producer to wholesaler to retailer. Most states prohibit vertical integration between the tiers, and most protect the three-tier system through a variety of regulatory means. Among the most common restrictions are limitations or outright bans on direct sales from producers to consumers.

Direct shipping restrictions, and especially bans on direct interstate shipments, are measures of a type that quite likely would inflict welfare losses on consumers and on many wine producers, especially smaller market participants. If existing

state restrictions on direct interstate shipments were removed, there would be more competition, which would have a positive impact on consumer and social welfare (that is, the total surplus of consumers and producers).

As we read the briefs submitted by the state parties and their *amici* in these cases, they do not seriously contest either the economic costs of the regulatory regime nor, by implication, the potential benefits of a national wine market that is free from protectionist inhibitions. Rather, they contend that the existing restrictions are justified by other state interests, such as the promotion of temperance, the protection of minors, tax collection considerations, and the maintenance of orderly market conditions. These concerns, however, cannot justify the *discriminatory* laws at issue in these cases. More broadly, the history and the contours of state restrictions on direct shipments, as well as the empirical evidence from state markets that lack those restrictions, indicate that the proffered public-interest justifications are not persuasive. The available evidence supports the economists' expectation that restrictions on market entry often serve to protect highly organized and entrenched interest groups, to the detriment of consumer welfare.

To repeat, we neither possess nor claim expertise on the true scope of the Twenty-first Amendment. With that caveat, we argue that the principles of open state borders and non-discrimination, as they have been explicated in this Court's decisions under the Commerce Clause, are consistent with the economic profession's well-accepted views on the benefits of free trade and competitive markets. Those views support the invalidation of the discriminatory state regulations at issue in these cases.

## I. DIRECT SHIPPING RESTRICTIONS DIMINISH CONSUMER AND ECONOMIC WELFARE

The U.S. wine market has been subject to relatively little systematic empirical or econometric analysis. That is unfortunate (for the purposes of these cases) but hardly surprising. Some markets—such as network industries, natural monopolies, or industries with declining marginal costs—cause a great deal of disagreement among economists. The wine market, in contrast, is a classic, competitive market, albeit a heavily regulated one. The dynamics of such markets and the consequences of regulatory interventions have been well-understood for many decades. The application of that expert consensus to the wine market and its regulatory context is straightforward.

### A. State-Imposed Direct Shipping Restrictions Constitute a Significant Regulatory Barrier to an Efficient National Wine Market

Over the past 25 years, the United States wine market has undergone dramatic changes at the production stage, in the distribution process, and at the demand level. The present market conditions, insofar as they pertain to state-imposed direct shipping restrictions, are summarized with admirable clarity in a study by the staff of the Federal Trade Commission. Report from the Staff of the Federal Trade Commission, *Possible Anticompetitive Barriers to E-Commerce: Wine* (July 2003) *available at* http://www.ftc.gov/os/2003/07/winreport2.pdf (hereinafter FTC Report). The fact that petitioners and their *amici* do not bother to discuss the findings of the FTC Report provides further evidence of the soundness of the FTC staff's analysis.

The wine industry has been characterized both by a remarkably high degree of market entry on the part of wineries and by increased concentration on the part of distributors. "[A]s demand has increased for individualistic, hand-crafted wines,

the number of wineries has grown dramatically, from between 500–800 in 1975 to well over 2,000 today." FTC Report at 6 (footnote citing estimates omitted). At the same time, concentration in the market for mass-marketed wines has increased. Thirty U.S. wine companies supply over 90 percent of U.S. production, and the top three firms account for 60 percent of volume. Gina M. Riekhof & Michael E. Sykuta, *Politics, Economics, and the Regulation of Direct Interstate Shipping in the Wine Industry*, CORI Working Paper 03-04 at 7 (citing estimates and sources) *available at* http://ssrn.com/abstract=481947 (hereinafter Riekhof & Sykuta). The distributor industry has experienced rapid concentration. Market participation has dropped from several thousand in the 1950s to a few hundred today. In some regions, the distributor market may be approaching near-monopolistic conditions, although systematic data appear to be unavailable. FTC Report at 6.

Clearly, state regulatory interventions impede competition at the wholesale level. Many states have enacted laws that grant wholesalers preferential contract rights, establish exclusive territorial arrangements between wholesalers and wineries,[2] and deter price cutting. The FTC has been sharply critical of some of these measures and their anti-competitive effects. FTC Report at 6–7 (listing examples). There is also some evidence that market concentration has increased at the retail level. Riekhof & Sykuta at 9–10.

At the consumer level, the demand for high-end wines—a luxury good—has increased with the general rise in prosperity.

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[2] Such arrangements are not necessarily anti-competitive. In some situations, they may well lower price and improve quality. However, in combination with other government interventions (such as laws that make it difficult for suppliers to terminate contracts with distributors), state-protected exclusive territories tend to produce anti-competitive outcomes. Douglas Glen Whitman, *Strange Brew: Alcohol and Government Monopoly* 27–28 (2003).

This group of consumers is largely composed of the wealthiest members of our society. The Wine Spectator—the most widely circulated magazine devoted exclusively to wines—counts upwards of 1.1 million readers, with a median household income of $144,500. Wine Spectator Advertising Information 3 (2003) *available at* http://www.winespectator.com/Wine/Images/Graphics/ads/WS_NAT_EKIT.pdf (hereinafter Wine Spectator). This segment of the overall wine-consuming populace appears to have grown rapidly and substantially over the past decade. For example, the Wine Spectator's paid circulation has increased from roughly 150,000 in 1994 to nearly 375,000 in 2003. Wine Spectator at 8. At the same time, the emergence of the Internet as a distribution channel has, in the states where direct purchases are permitted, substantially increased consumer access to rare high-end wines. Direct shipments are estimated at over $500 million, or 3% of the wine market. FTC Report at 5 (citing estimates).

In this changed market environment, the shrinking distributor network has resulted in a bottleneck. And market participants, not surprisingly, have attempted to bypass this bottleneck. Large wineries have created their own distribution systems, where that is permitted by law. Small wineries, for their part, have sought to avail themselves of direct-sales opportunities. Those firms, often producing no more than two or three-thousand cases per year, cannot supply the volume required for mass distribution. For distributors, carrying small-volume wines entails high transaction costs. Distributors are typically responsible for promotional activities, such as wine tastings. Small-scale sales do not warrant such expenditures. As a result, "only the 50 to 100 largest wineries are able to secure widespread representation in distribution networks." Alan E. Wiseman & Jerry Ellig, *Market and Nonmarket Barriers to Internet Wine Sales: The Case of Virginia*, 6:2 Business and Politics at 5 (2004) *available at* http://www.bepress.com/bap/vol6/iss2/art4 (hereinafter Virginia

Study). Small wineries typically use direct shipments as their primary means of accessing the national market. E-commerce has rendered such sales viable, but regulatory prohibitions on direct shipments in many states bar mutually beneficial transactions among small wineries and their consumers.

We know of no systematic effort to quantify the welfare effects of the existing direct shipment restrictions. Highly illustrative evidence, however, comes from the Virginia Study, the only available empirical comparison of the online and off-line wine markets. The study was conducted in 2002 in the area of McLean, Virginia, when Virginia administered a ban on direct interstate shipments (since lifted). The authors compared online prices and availability of 83 popular wines, identified through a poll that incorporates consumer preferences, with off-line prices and availability in the McLean area. Availability was unambiguously higher online. Even among the most popular twenty wines, eight were unavailable in the McLean area. Price comparisons, predictably, varied greatly with purchase quantity, the price level of wines, and delivery method for online purchases. Since transportation costs do not change with the price of wine, and since transportation costs constitute a larger proportion of total cost for low-volume shipments, online purchases are not a winning proposition for the connoisseur's sampling purposes (let alone a teenager's instant gratification). Unsurprisingly, though, the Virginia Study found substantial price advantages for online, by-the-case purchases of high-end wines. Direct shipment, in other words, generates economic benefits for the customer base that matches the Wine Spectator's readership, more than two-thirds of which report by-the-case wine purchases. Wine Spectator at 6.

The magnitude of the welfare losses that attend to direct shipping restrictions cannot be estimated with any confidence. Virginia Study at 20 n.38 (noting that a comprehensive welfare analysis would require additional, currently unavailable data). It is clear, however, that there exists a robust demand for online

wine purchases and a producer and distribution base to serve that demand. One cannot reasonably contest the FTC staff's conclusion that "[s]tate bans on interstate direct shipping of wine represent the single largest regulatory barrier to expanded e-commerce in wine." FTC Report at 3.

### B. The Demise of Direct Shipping Restrictions Would Yield Economic Benefits

These cases do not challenge direct shipping restrictions per se. They challenge only *discriminatory* barriers to direct wine shipments. If those barriers were invalidated (as we urge the Court to do), Michigan and other states would remain free to erect those same barriers on a non-discriminatory basis. *Beskind v. Easley*, 325 F.3d 506, 518–519 (4th Cir. 2003). That lawful policy choice, however, would be bad economic policy.

The petitioners and their *amici* defend direct shipment restrictions on wine as an urgent exercise of the states' police powers and their interests in encouraging temperance, fighting teenage drinking, and ensuring tax collection. We do not dispute the legitimacy of those objectives. As economists, however, we are trained to demand evidence, and, moreover to weigh all of the costs and benefits of a particular public policy. On both counts, the petitioners' policy positions and assertions are unpersuasive.

The FTC Report provides no reason to believe that the demise of direct shipping restrictions would lead to the dire consequences predicted by the petitioners and their *amici*. The FTC staff conducted an extensive review of the experience in states that already permit direct interstate shipment of wine. Surveyed state officials reported "that they have experienced few, if any, problems with interstate direct shipment of wine to minors." FTC Report at 31. That observation is consistent with the economic evidence that Internet purchases of wine are an

uneconomical and therefore unlikely proposition for teenagers. Similarly, many states have adopted less restrictive means than an outright prohibition on direct interstate shipments, and those states report "few, if any" problems with tax collection. *Id.* at 38. The permit systems administered by many states appear to be a viable means of ensuring tax collection. *Id.* at 38–40. In that light, it is not surprising that the great majority of lower courts have concluded that states have less restrictive means than a ban on direct interstate shipments to enforce legitimate state objectives. *Id.* at 27–29 (summarizing cases).

Similarly, the state's *amici* have warned that the invalidation of Michigan's laws would spell the collapse of the three-tier system not only for wine but also for beer and liquor. *See, e.g.*, Brief of National Beer Wholesalers Association in Support of Petitioners at 4 (Sixth Circuit decision in this case "toppled a comprehensive three-tier system governing the distribution of intoxicating liquor"). That contention grossly exaggerates the likely consequences on the distribution system and, moreover, ignores the economic benefits of broader market access. The invalidation of direct shipping restrictions would favorably affect the availability and, most likely, the price of many wines. Both effects would enhance consumer welfare. The likely effects on industry structure and in particular the three-tier system are indeterminate, as they will depend on market participants' responses and on regulatory interventions. The most likely effect, however, is a more efficient distribution system.

> ***(i) Availability.*** A key effect of direct shipping restrictions is not to reduce the aggregate supply of wine (adults can buy all the wine they want) but rather to compress the range of choice. Inventory costs and diseconomies of scale prevent wholesalers and retailers from offering anything remotely comparable to the breadth of choice of

wines and vintages offered by producers. Due to economic necessity, the distribution network limits the choice to a relative handful of well-known brands. A reasonable estimate of the welfare losses associated with the unavailability of many wines would require systematic information on elasticities and product substitution in this market. We do not possess such information. Elementary economic reasoning and casual empirical information, however, suggest that those losses very likely could be significant.

As noted earlier, the principal purchasers of direct shipment are frequent consumers of high-end wines, who purchase the goods for future rather than immediate consumption. The revealed preferences of these consumers indicate that they view limited selection as anything but trivial. They would not subscribe to expensive magazines, let alone devote time to reading them, if they were indifferent between one Chardonnay and the next. Wholly apart from price effects and even quality, supply diversification itself has sizeable benefits for consumers who want to stock a respectable wine cellar (much as liquid and diversified equity markets benefit financial investors). Moreover, these consumers confront very high opportunity costs in the form of lost income or foregone leisure time. These costs mount as consumers spend time in traffic on the way to distant specialty retail stores, instead of selecting and purchasing wines—from a much greater variety—on the Internet. Needless to say, nothing in economic theory commands special preference for rich, time-pressed consumers. But nothing, either, warrants a dismissal of the welfare losses that occur as a result

of anti-competitive regulation whose effects are especially felt in this segment of the populace.

The demise of direct shipping regulations would necessarily expand selection and availability, as no regional retail market (let alone an individual retailer) can possibly offer the variety that is available on the Internet. However, market participants will not remain idle when confronted with increased competition. Broader availability of wines through direct shipping will likely increase selection at the retail level (certainly among local specialty retailers, if not necessarily within individual sales locations). Retail demand, in turn, may well prompt efforts at the distributor level to supply a greater variety of wines.

***(ii) Price.*** While the likely price effects of a demise of direct shipping restrictions for wine are more conjectural than the predictable and unambiguously salutary effects on selection, general economic evidence strongly suggests that the elimination of artificial barriers to market entry should reduce prices. Economic models show conflicting results with respect to the price effects of Internet sales. Virginia Study at 9–11; FTC Report at 16–17 and sources cited *id.* n.75. The Virginia Study, as noted, showed substantial price advantages for by-the-case purchases of high-end wines over the Internet. As the authors observe, the static design of that study—conducted in a jurisdiction where direct shipments were prohibited at the time—permits no inference concerning the price effects (let alone the welfare effects) under competitive conditions. Virginia Study at 29. Still, the evidence of that study is consistent with the economists' ordinary

expectations about the price effects of broader competition: prices should generally drop, though not necessarily for all wines. That expectation is further buttressed by considerations of political economy, more fully discussed below. The fact that the three-tier system enjoys government protection in many states suggests that those protections generate surplus profits, which are likely to accrue to distributors in the form of economic rents and to consumers in the form of higher prices. The demise of direct shipping prohibitions would—in the absence of other government barriers to broader market entry—erode those rents and redound to consumers' benefit. FTC Report at 23.

***(iii) Market Structure.*** The state defendants and their *amici* in these cases—in particular, wholesalers—have intimated that the invalidation of discriminatory direct shipping regulations would spell the demise of the three-tiered system. Brief for the Wine and Spirits Wholesalers of America in Support of Petitioners at 4, 24. In contrast, those same interests have described the existing, mandatory three-tier system as efficient. C. Boyden Gray, *Written Statement on Behalf of Wine and Spirits Wholesalers of America* at 2 (2002) *available at* http://www.ftc.gov/opp/ecommerce/anticompetitive/panel/gray.pdf.; FTC Report at 22 (citing additional sources). These positions are inconsistent.

A three-tier market structure is efficient in many settings. That is why it exists in many unregulated commodity markets, and why it continues to exist with respect to wine sales in states that do not

mandate a three-tier structure (such as California) or that permit direct sales subject to some restrictions (such as Illinois). Daniel L. McFadden, *Interstate Wine Shipments and E-Commerce* at 3 (2002) *available at* http://www.ftc.gov/opp/ecommerce/anticompetitive/panels/mcfadden.pdf (hereinafter McFadden). Specialization, efficiencies of scale, and other considerations often justify "middlemen" and their mark-ups.

What is at stake, however, is not the three-tiered system per se but rather the governmental imposition and protection of that system. The fact that many wine market participants have attempted to bypass the distributor bottleneck at both ends shows that a three-tiered system—especially where it is artificially imposed—is inefficient for those firms. For example, Australia's Foster's Brewing Company in 2001 acquired Beringer's, a large California winery, to leverage Beringer's distribution system for Foster's U.S. market expansion. Other market participants, including *amicus* Henry Wine Group, have consolidated portfolios of smaller wineries to build distribution capacity. Such vertical integration and acquisitions indicate that the costs of equivalent market access through arms-length market transactions must be quite high. Riekhof & Sykuta at 10; Ronald H. Coase, *The Nature of the Firm*, 4 Economica 386 (1937). Similarly, small wineries, in concert with consumer groups and non-profit law firms, have waged a long and determined campaign against wine marketing restrictions. Such investments suggest that the gains from reducing barriers to entry very likely could be sizable.

No one can confidently predict the market structure consequences of deregulating the wine market—any more than the economists who predicted substantial consumer gains from airline deregulation could predict the market structure that would emerge (*see, e.g.*, Michael E. Levine, *Is Regulation Necessary? California Air Transportation and National Regulatory Policy*, 74 Yale L. J. 1416 (1965)). For reasons mentioned, however, the demise of state protections of the three-tiered system will very likely generate greater diversity of distribution arrangements. A three-tiered system would survive where it generates efficiencies and suffer profit erosion where it fails to adjust to changed market conditions.

Such erosion of profits, however, by no means spells the demise of a three-tiered system. Amicus Daniel L. McFadden, one of the nation's leading experts on consumer markets (and an owner of a small winery), has argued that the distributors' investments in protecting their turf are disproportionate to the consumer benefits that would flow from a demise of artificial government protections of a three-tiered system. One reason why that might be so is that the broader availability of individualistic wines would tend to sharpen consumer awareness and appreciation. McFadden at 3. This analysis is consistent with the prediction that the demise of direct shipping restrictions will principally affect the selection rather than the price of wines. Put differently, expanding markets are not a zero-sum game.

One likely and salutary effect would occur "upstream," in wine production. Since one does not normally observe rapid market entry and increased

market concentration at the same time, one can infer that the existing distribution bottleneck substantially contributes to the bifurcation of the market into large and increasingly concentrated producers at one end and small wineries that cater to tourists and Internet purchasers at the other end. Dale M. & Philip L. Martin, *Inside the Bottle: The Wine Business*, Choices 30, 33 (Fall 2002). A more flexible distribution system would likely contribute to a market structure that more accurately reflects market forces and efficiencies.

## II. DISCRIMINATORY DIRECT SHIPPING RESTRICTIONS ERECT PROTECTIONIST BARRIERS THAT LACK A PLAUSIBLE JUSTIFICATION

### A. The Nondiscrimination Principle of the dormant Commerce Clause Serves Compelling Economic Purposes

As noted, the petitioners and their *amici* fail to cite (let alone rebut) the FTC Report's finding that states have many less restrictive means than a direct shipment prohibition (especially a discriminatory prohibition) to protect legitimate tax and public health interests. Perhaps in recognition of the weakness of their position, several briefs on behalf of the petitioners argue for an overruling of Supreme Court precedents that require a tight means-ends relationship with respect to discriminatory state laws. *See, e.g.*, Brief for the Petitioners 28 ("Michigan respectfully submits that *Bacchus* was wrongly decided..."); Brief of Ohio and 32 Other States as *Amici Curiae* in Support of Petitioners 10–12 ("*Bacchus* was wrongly decided and should be overruled."); Brief of National Beer Wholesalers Association

as *Amicus Curiae* in Support of Petitioners 15 n.10 ("*Bacchus* should at the least be confined to its unique facts and procedural history."). That extreme position should be rejected. The nondiscrimination principle of the dormant Commerce Clause serves compelling economic interests that would otherwise be unprotected.

To be sure, economic rents tend to dissipate, and there are reasons to believe that this is already happening in the wine distribution market. McFadden at 3. The relevant consideration, however, is the time horizon. One can argue, for example, that monopolies will inevitably disappear over time and that the only function of antitrust law is to shorten the time frame over which that result will occur. Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1 (1984). But while that consideration counsels caution in extending legal norms to poorly understood contexts, the game is plainly worth the candle when we can be sure about the results of applying the basic rules to the easy cases. These cases, as explained to us, do not call for an extension of the dormant Commerce Clause; they confront the hard core of that doctrine with an openly discriminatory state violation. Reliance on long-term economic forces is no reason to repeal Section 1 of the Sherman Act or to suspend the operation of the dormant Commerce Clause in a paradigmatic discrimination case.

Nor is there any comfort in the observation that the costs of state prohibitions of direct wine shipments will in all events be paid by regulating states' own citizens. The ready answer is that this Court has steadfastly rejected, in cases involving discriminatory state regulation, the argument that the in-state incidence of the costs somehow exempt a discriminatory regime from Commerce Clause condemnation. *West Lynn Creamery v. Healy*, 512 U.S. 186, 203 (1994); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 271–73 (1984). For one thing, there are two sides to every interstate transaction, and the dormant Commerce Clause protects the out-of-state seller at least to the same extent

as the in-state consumer. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949). See also *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 267 (1984) (out-of-state wholesalers have standing to challenge discriminatory tax exemption for in-state producers). For another thing, the incidence of a discriminatory tax or regulation does not necessarily match its form or stated range of application. This implies that from a strictly economic perspective, a formal nondiscrimination principle will be both under- and over-inclusive. However, economists agree that incidence analysis is a devilishly difficult and uncertain business for which courts are poorly equipped. Stephen F. Williams, *Severance Taxes and Federalism: The Role of the Supreme Court in Preserving a National Common Market for Energy Supplies*, 53 Colo. L. Rev. 281, 290–95 (1982). The true test of an efficient legal rule is not to get every case right but to reduce error costs in the general run of cases. The Court's nondiscrimination rule, which condemns discriminatory state laws irrespective of their economic incidence, satisfies that criterion.

### B. Direct Shipping Restrictions Owe Their Continued Existence to Protectionist Interest Group Pressures Rather Than Considerations of Consumer Welfare

The three-tier system was constructed in the wake of the Twenty-first Amendment. Its principal purpose was to preclude the re-emergence of a "tied" system between producers and exclusive retailers. That system, it was widely believed, had before Prohibition induced excessive alcohol consumption and enabled organized crime to gain influence over alcohol distribution and sales. Even the best-constructed and most public-spirited regulatory system, however, may outlive its usefulness (for example, on account of technological change in the regulated industries) and, moreover, mutate into a means of

protecting private rather than public interests. Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & Econ. 211 (1976); Richard A. Posner, *Theories of Economic Regulation*, 5 Bell J. Econ. 335 (1974); George Stigler, *The Theory of Economic Regulation*, 2 Bell J. Econ. 3 (1971).

In the decades following the enactment of the Twenty-First Amendment, virtually all states adopted a three-tier system. Most states enacted direct shipment prohibitions to protect that system, but those restrictions played only a small role, as the technologies of those times rendered remote transactions between producers and consumers uneconomic. In 1986, however, California limited direct shipment to imports from states that would permit, on a reciprocal basis, the direct shipment of California wines to their citizen-consumers. The economic logic is not hard to fathom: by limiting direct shipment rights to reciprocity states, California—home to the nation's largest wine industry—sought to open other states' markets to its domestic producers.

California's move prompted a change from a relatively homogeneous state regulatory environment to the current patchwork of state alcohol regulation. Some states responded relatively quickly in the manner hoped for by California; there are now 13 reciprocity states. Many other states loosened their restrictions and allowed direct shipments from out-of-state, often under a permit system. A few states, however, Michigan among them, tightened their direct shipment regulations.

The fierce contention over direct interstate shipments, which has at last reached this Court, is driven by interest groups. On one side are wine consumers, allied with small wineries that seek to satisfy consumer demand for small-volume, high-end wines but are inhibited in that endeavor by the existing distribution system. (Large wineries, which fare perfectly well under the existing distribution system and some of which have succeeded in establishing their own national distribution networks, are sitting on the sidelines.) On the other side stands

an unusual coalition. Bruce Yandle, *Bootleggers and Baptists: The Education of a Regulatory Economist*, Regulation 12 (May/June 1983). The wholesalers of alcoholic beverages have emerged as the nation's staunchest and most resourceful advocates of temperance. More traditional temperance forces, for their part, have complemented their moral arguments with a rigorous defense of the regulatory bottleneck and to that end joined forces with the alcohol wholesalers. This unlikely coalition enjoys the support of public sector interests—that is, state regulators and tax administrators.

These interest group alignments permit inferences both with respect to marketplace economics and with respect to the credibility of public-interest rationales to suppress competition. The interests that advocate a repeal of restrictions of direct interstate wine shipping (whether by legislative means or as a constitutional proposition) are by and large open about their economic self-interest, but they can buttress their position with arguments of consumer welfare. In contrast, the defenders of the existing distribution system have failed to defend their position on economic grounds, because no such grounds exist. They have instead relied on purported public interest rationales other than consumer welfare, some of which are diametrically opposed to their manifest economic interests.

The variegated state responses to California's unilateral adoption of a reciprocity regime in 1986 suggest an obvious question: why did formerly homogenous state regulatory regimes generate such disparate responses? Riekhof's and Sykuta's sophisticated analysis directly addresses that question and finds "that economic interests play a significant role in determining a state's adoption of direct shipment [regulations], but no evidence supporting a general public interest motivation." Riekhof & Sykuta at 4. That finding is highly plausible even at an intuitive level: "If direct shipment prohibitions prior to 1986 were in place solely for public interest reasons, it would be difficult to explain why

California's decision to adopt reciprocity would have its intended effect of opening up access to no-shipment states." *Id.* at 12. Unsurprisingly, the authors find that the size of a state's wine industry (number of wineries relative to state wine consumption) is positively related to the adoption of reciprocity laws. Conversely, the size and concentration of the distributor industry are negatively correlated with the likelihood that reciprocity legislation will be enacted. *Id.* at 22. Riekhof & Sykuta found that public sector interests (such as tax collections) also affect state responses. In contrast, none of the authors' proxies for public interest considerations appeared to have a significant effect on state policy responses. *Id.* These results are highly consistent with well-accepted general economic theories of regulation. They directly affect the present case: "To the extent that public welfare interests are required by courts to justify states' restrictions on interstate commerce, our results cast a shadow of doubt on public interest arguments in the area of direct shipment of wine." *Id.* at 26.

### C. The Constitutional Principle of Non-Discrimination, as Applied by This Court, is Supported by Sound Economic Reasoning

Every federal system (loosely speaking) confronts the challenge of reconciling open borders—a minimum condition of an integrated national market—with the preservation of the member-states' legitimate regulatory powers. A number of principles answer to the task—none of them perfectly, but some well enough. *See generally* Michael Trebilcock & Robert Howse, *A Cautious View of International Harmonization: Implications from Breton's Theory of Competitive Governments, in Competition & Structure: The Political Economy of Collective Decisions* 386 (Gianluigi Galeotti, Pierre Salmon, & Ronald Wintrobe eds., 2000).

As has been pointed out, the governing principle should be stated explicitly in the federal system's general charter. See Antonin Scalia, Chapter 16 in *Federalism in a Changing World: Learning from Each Other* 539 (Raoul Blindenbacher & Arnold Koller eds., 2003) (explaining the advantages of the nondiscrimination rule for a European audience). But the need for a harmonizing principle is so strong that courts have felt compelled to infer it even where the governing instruments do not literally provide for it. The European Court of Justice, for example, has inferred from the European Treaties a principle of "mutual recognition," which (in the absence of countervailing regulations by the European Commission) compels member-states to open their markets to other EU countries' goods so long as those goods conform to the regulatory requirements of the origin state (rather than the destination state). *Rewe Zentrale v. Bundesmonopolverwaltung für Branntweiñ* (Cassis de Dijon), 120/78 [1979] ECR 649, [1979] 3 CMLR 494. This principle directly bars member-state regulations that discriminate against other member-countries' producers. It is enforced in part through a demanding "least restrictive means" test, which compels member-states to pursue regulatory objectives that have discriminatory effects by means that minimize those effects. *Commission v. Germany*, 178/84 [1987] ECR 1227, [1988] 1 CMLR 780; *Walter Rau v. de Smedt*, 261/81 [1982] ECR 3961, [1983] 2 CMLR 496.

A principal alternative—more respectful of state regulatory authority than mutual recognition—is the principle of nondiscrimination. As explained to us, this principle is embodied in this Court's decisions under the dormant Commerce Clause. Viewed through economists' eyes, this principle appears to serve important economic functions. First, it obviously represents a middle path between forced exclusion (which could Balkanize the economy) and forced entry by outsiders (which would eviscerate the states' police powers). Second, the principle serves as a vital safeguard against "naked"

interest group transfers (or, as the Founders called it, "partial legislation") that serve no public purpose but merely transfer wealth—typically, from unorganized constituencies (such as consumers) to highly organized interests (such as liquor distributors). The presumption against such transfers pervades the entire Constitution. Cass Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689 (1984).

A non-discrimination principle in interstate commerce provides no protection against purely in-state exploitation. But it need not do so: the principal protections come from the fact that citizens vote, both at the ballot box and with their feet (that is, by leaving states that give too wide a berth to interest group exploitation). Precisely for fear of those consequences, state-level factions will seek to impose the costs of their schemes on outsiders, by regulating on an extra-territorial basis or by enacting schemes that exempt in-state interests from burdensome tax or regulatory schemes. The dormant Commerce Clause rightly prohibits both stratagems. *See, respectively, Healy v. The Beer Institute*, 491 U.S. 324 (1989); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). In that fashion, the non-discrimination rule curbs the destructive force of faction on the decisive margin. *See generally* Saul Levmore, *Interstate Exploitation and Judicial Intervention*, 69 Va. L. Rev. 563 (1983) (arguing that the Supreme Court has employed the dormant Commerce Clause, and should continue to employ it, as a means of preventing interstate exploitation).

These elementary considerations apply with full force to the present context. Michigan may permit direct wine shipments (even while prohibiting direct shipments of liquor or beer), or it may prohibit such shipments for all market participants, in-state and out-of-state. What the state may not do, barring the strongest possible justification, is to discriminate against out-of-state parties. The economic justification for that rule, to repeat, is that such discrimination is a highly reliable signal for illicit interest group transfers. If a state is unwilling to impose the

costs of some regulatory scheme on in-state producers (on a proportional basis), its proffered public interest rationales for the regulation are likely a pretext for redistribution. That presumption may be overcome only by an exceedingly persuasive showing that the geographic discrimination in fact corresponds to a pressing public purpose. *Maine v. Taylor*, 477 U.S. 131 (1986). Put differently, the nondiscrimination rule of the dormant Commerce Clause holds in-state interests hostage to the purpose of distinguishing bona fide public purposes from naked interest group transfers. While the burdened interest in a particular state will resent that fact in any given case, the rule works with perfect symmetry: the injunction against home-state preferences is the flipside of the more important right of nondiscriminatory access to other states' markets. Economic actors unaware of which economic position they would assume after a random assignment would therefore, if rational, choose a non-discrimination rule that limits opportunities for exploitation on all sides. *See generally,* Geoffrey Brennan & James M. Buchanan, *The Power to Tax* (1980). Accordingly, there is no obvious economic reason for recognizing opportunistic preferences in favor of discrimination adopted after the fact.

## CONCLUSION

For the foregoing reasons, the decision of the Sixth Circuit should be affirmed.

Respectfully submitted,

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**Nos. 03-1116 & 03-1120**

IN THE

# Supreme Court of the United States

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JENNIFER M. GRANHOLM, *et al.*

*Petitioners,*

v.

ELEANOR HEALD, *et al.*

*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## BRIEF AMICUS CURIAE OF AMERICAN HOMEOWNERS ALLIANCE; AMERICAN LEGISLATIVE EXCHANGE COUNCIL; AMERICANS FOR TECHNOLOGY LEADERSHIP; COMPETITIVE ENTERPRISE INSTITUTE; CONSUMER ALERT; eBAY, INC.; INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA; INTERNET COMMERCE COALITION; NETCHOICE; PACIFIC RESEARCH INSTITUTE; THE PROGRESS & FREEDOM FOUNDATION; SOFTWARE & INFORMATION INDUSTRY ASSOCIATION IN SUPPORT OF RESPONDENT

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## INTEREST OF THE *AMICI*[*]

*Amici* are entities involved directly or through their members in electronic commerce. We submit this brief to highlight the significance of these cases for e-commerce, not only relating to wine, but also in other goods and services.

The **American Homeowners Alliance** represents the nation's 70 million homeowners in their desire to use the Internet to its full potential to efficiently and economically obtain the goods and services they need and desire.

The **American Legislative Exchange Council** (ALEC) is the nation's largest bipartisan association of state legislators. Its mission is to discuss, develop, and disseminate public policies that expand free markets, promote economic growth, limit government, and preserve individual liberty. ALEC's interest in this case stems from its concern that laws unnecessarily restricting competition by forcing consumers to utilize an antiquated monopoly system have established false barriers that discriminate against e-commerce and free market forces.

**Americans for Technology Leadership** (ATL) is a broad-based coalition of technology professionals, consumers and organizations dedicated to limiting government regulation of technology and fostering competitive market solutions to public policy issues affecting the technology industry. ATL's interest in this proceeding stems from its work to allow the growth of technology, including e-commerce, without burdensome government regulation.

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[*] Consent to the filing of *amicus* briefs has been lodged with the Clerk of this Court. No counsel to a party has authored any portion of this brief. No party or entity other than those listed as amici on the cover of this brief has contributed monetarily to the preparation or submission of this brief.

The **Competitive Enterprise Institute** is a nonpartisan policy analysis organization, dedicated to the principles of limited constitutional government and free enterprise. The Competitive Enterprise Institute has a substantial interest in supporting the position that the Commerce Clause protects the national market from protectionist state legislation and has a specific interest in alcohol-related issues.

**Consumer Alert** is a national non-partisan, non-profit consumer organization dedicated to enhancing understanding and appreciation of the free market. Consumer Alert accordingly provides economic, scientific, and risk data affecting public policy decisions to legislative and regulatory bodies, courts, the media and the public. Consumer Alert has an interest in this case because its members are harmed by the limitations on free trade imposed by state bans on direct shipment of out-of-state wine.

**eBay Inc.** with over 100 million registered users, is the world's largest online marketplace and the most popular shopping site on the Internet. Using eBay's online services, buyers can search for and buy goods and services in thousands of categories.

The **Internet Commerce Coalition** (ICC) is a coalition of Internet service providers, e-commerce companies, and trade associations in the United States. ICC's members include AT&T, BellSouth Corporation, Comcast Corporation, eBay Inc., MCI, Inc., SBC Communications Inc., Time Warner, and Verizon Communications.

The **Information Technology Association of America** (ITAA) provides global public policy, business networking, and national leadership to promote the continued rapid growth of the information technology industry. ITAA 's members range from the smallest information technology

start-ups to industry leaders in the Internet, software, information services, digital content, systems integration, telecommunications, and enterprise solution fields

**NetChoice** is a coalition of businesses and consumers who are united in promoting the increased choice and convenience enabled by e-commerce. NetChoice members have a direct interest in preventing and removing barriers to e-commerce, such as protectionist laws that prevent interstate shipments of wine.

The **Pacific Research Institute** is a non-partisan, non-profit think tank based in San Francisco that focuses on finding market-based solutions to important public policy problems. One of PRI's key areas of research is electronic commerce. PRI's members are consumers who are harmed by the limitations on free trade imposed by the ban on direct shipment of out-of-state wine by the states of New York and Michigan.

The **Progress & Freedom Foundation** is a non-profit research and educational institution that studies the digital revolution and its implications for public policy, based on a philosophy of limited government, free markets and individual sovereignty. PFF's underlying philosophy combines an appreciation for the positive impacts of technology with a classically conservative view of the proper role of government. PFF's interest in this proceeding stems from its commitment to promoting expanded use of the Internet for e-commerce, free of discriminatory state regulation.

The **Software & Information Industry Association** (SIIA) is the leading U.S. trade association committed to promoting and protecting the interests of the software and information industries. SIIA represents over 600 member companies,

including prominent publishers of software and information products for reference, education, business, consumer, Internet and entertainment uses.

## SUMMARY OF ARGUMENT

As interstate commerce has grown, businesses have used a variety of technological means—from mail-order-catalogs to 1-800 numbers to, most recently, electronic commerce using the Internet—to reach consumers nationwide. E-commerce facilitates the realization of the Founders' vision of a national common market by permitting even the smallest merchant to reach consumers in every state and by giving consumers the broadest possible choice of products and vendors. As this Court has repeatedly recognized, that market will be destroyed if states are permitted to enact measures that discriminate against interstate commerce in favor of local economic interests.

Michigan's prohibition on direct sales by out-of-state wineries to Michigan consumers, while simultaneously permitting direct sales by Michigan wineries, is such a discriminatory measure. Under established dormant Commerce Clause doctrine, such measures are constitutional only if the state bears the burden of showing the absence of nondiscriminatory means to advance its legitimate interests. In this case, the state's asserted interests of ensuring revenue collection and preventing sales to minors do not require discrimination against interstate sales and the attendant obstruction of e-commerce.

The Twenty-first Amendment does not save Michigan's otherwise unconstitutional discrimination. The assertion that the Twenty-first Amendment trumps the Commerce Clause when the state regulates the importation

of wine is untenable and contrary to this Court's precedents. The Twenty-first Amendment is not a license to discriminate against interstate sales or to protect local merchants from interstate competition. By permitting in-state wineries to make direct sales to consumers, while prohibiting all out-of-state wineries from making such sales, Michigan has exceeded the temperance interests that the Twenty-first Amendment was designed to protect, and its discriminatory regime must fall as offensive to the Commerce Clause.

## ARGUMENT

### I. INTERSTATE E-COMMERCE IS AN IMPORTANT PART OF THE NATIONAL COMMON MARKET THAT THE DORMANT COMMERCE CLAUSE IS DESIGNED TO PROTECT

This is a case about discriminatory state regulation of the sale of wine. More fundamentally, it is a case about the viability of interstate electronic commerce ("e-commerce") in the United States. Petitioners consider the interstate buying and selling of products and services via the Internet as a threatened "major breach of state regulatory regimes," Wholesalers' Br. at 38, and ask the Court to approve Michigan's blatantly discriminatory legislation in response to that threat. But interstate e-commerce, whatever the challenges it may pose to entrenched commercial interests and state regulatory bureaucracies, is also the most dramatic modern manifestation of the national common market that the Framers of the Constitution sought to promote. The protection of that market is the paramount goal of the Commerce Clause. *Amici,* organizations committed to the growth of e-commerce, urge the Court to take this opportunity to clearly delineate the crucial role of the

dormant Commerce Clause in preventing local protectionism from undermining that national market and the benefits it brings to consumers and businesses throughout America.

When the Framers wrote the Commerce Clause, they recognized the profound importance that a national market would have for the nation as a whole, as well as for the individual states. *See The Federalist* No. 42 (James Madison); Letter from James Madison to Joseph C. Cabell (Sept. 18, 1828), *available at* http://press-pubs.uchicago.edu/founders/documents/a1_8_3_commerces18.html. Although the Framers could not have imagined the technological advances that have led to the Internet, they could imagine, and worked to establish, the open, nondiscriminatory, and national market that the Internet and e-commerce have come to epitomize. As this Court recognized in *H.P. Hood & Sons, Inc. v. DuMond*, access to a national market is a strong incentive for economically productive activities, and a powerful check on state protectionism:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation. . . . Likewise, every consumer may look to the free competition of every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

336 U.S. 525, 539 (1949). As the national market has grown, small businesses have participated in it by using a variety of tools—mail order catalogues, 1-800 numbers, and, most recently, the Internet. The Internet is the quintessential interstate commerce medium that overcomes the tyranny of

distance, letting sellers in every state reach customers in every other state, thus fulfilling the Founders' vision of a single national market.

### *A. E-Commerce Delivers Substantial Benefits to Consumers and Small Businesses*

E-commerce delivers tangible benefits to all participants in the U.S. economy, but especially to consumers and small businesses. The United States Department of Commerce Census Bureau tracks e-commerce retail sales, which provide a compelling picture of the rapidly increasing role of e-commerce in the national economy. Retail e-commerce sales in the second quarter of 2004 amounted to $15.7 billion, up 23.1% from the second quarter of 2003, and representing 1.7% of the $919 billion in total U.S. retail sales during that period. *See* U.S. Census Bureau, *Retail E-Commerce Sales in Second Quarter 2004 Were $15.7 Billion, Up 23.1 Percent From Second Quarter 2003, Census Bureau Reports,* United States Department of Commerce News (Aug. 20, 2004), *available at* http://www.census.gov/mrts/www/current.html. Since the fourth quarter of 1999, when the Census Bureau began publishing this data, e-commerce retail sales have increased 193%. *See id.*[1] Online retail sales are growing at ten times the rate of their "brick-and-mortar" counterparts. *See State Impediments to E-commerce: Consumer Protection or Veiled Protectionism: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the House Comm. on Energy and Commerce,* 107th Cong. 2d Sess. 7 (2002)

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[1] Some knowledgeable observers estimate even greater numbers. For example, *amicus* Progress & Freedom Foundation estimates that business to consumer electronic commerce is expected to grow from $95.7 billion in 2003 to $229 billion in 2008. The Progress & Freedom Foundation, *Digital Economy Fact Book* 63 (6th Ed. 2004).

[hereinafter *Commerce Committee Hearing*]. As of 2002, e-commerce between businesses had reached roughly $1 trillion per year, *see Commerce Committee Hearing*, at 1 (statement of Rep. Cliff Stearns, Chairman, House Subcomm. on Commerce, Trade, and Consumer Protection). Such growth is staggering, and directly attributable to the protections offered by the dormant Commerce Clause and its assurance of a national marketplace.

E-commerce is available for virtually *all* products and services, from BMWs to bulldozers, antique furniture to hi-tech computers; from the oldest vinyl records to the most recent DVDs, and for a widening array of services, from graphic design to auto repair. *See, e.g., Commerce Committee Hearing*, at 15; Fed. Trade Comm'n, *Possible Anticompetitive Barriers to E-Commerce: Wine* 2 n.3 (2003), *available at* http://www.ftc.gov/os/2003/07/winereport2.pdf [hereinafter *FTC Study*]. Perhaps the quintessential business illustrating this is that of *amicus* eBay, an online marketplace bringing together over 100 million registered buyers and sellers, and currently containing more than 20 million listings, including those products and services mentioned above, in over 45,000 discrete categories.

The benefits of e-commerce to consumers are the benefits of market competition: greater choice and lower prices. Consumers now have the ability to do nationwide comparison shopping for nearly everything they buy, and e-commerce has lowered the costs of doing business across state lines. Online sellers must compete not only with other online sellers, but also with those working in traditional retail channels. Likewise, traditional "brick-and-mortar" businesses can no longer base their prices on what the local market permits but must consider the price for similar goods on Internet sites. E-commerce has proved essential to many small businesses, who have gained access to larger markets

without having to pay fees to middlemen or setting additional distribution channels.

As a result, consumers have the opportunity to choose the most attractive product from a variety of online and traditional sellers. This vigorous national competition has driven prices down, benefiting both consumers and the economy. That same competition, however, has begun to displace entrenched local commercial interests who view the Internet as a threat. As in the case of wine sales, these interests often seek discriminatory state regulation in order to stifle the growth of e-commerce.

### *B. Discriminatory State Barriers Are Restraining the Growth of E-Commerce*

The benefits of e-commerce to the national economy cannot be fully realized if states may enact regulations that discriminate against interstate transactions.[2] The laws at issue in this case, and in *Swedenburg v. Kelly*, No. 03-1274 (2004), are just such enactments: they make difficult or

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[2] A number of lower courts have recognized that the inherently interstate nature of the Internet renders e-commerce especially vulnerable to varying state regulations, and courts have properly given that factor special importance when undertaking dormant commerce clause analysis. *See e.g., Center for Democracy & Tech. v. Pappert*, No. 03-5051, 2004 U.S. Dist. LEXIS 18295 (E.D. Pa. Sept. 10, 2004); *Cyberspace Communs., Inc. v. Engler*, 55 F. Supp. 2d 737, 751-52 (E.D. Mich. 1999); *Am. Library Ass'n v. Pataki*, 969 F. Supp. 160, 168-69 (S.D.N.Y. 1997) ("The unique nature of the Internet highlights the likelihood that a single actor might be subject to haphazard, uncoordinated, and even outright inconsistent regulation by states that the actor never intended to reach and possibly was unaware were being accessed. Typically, states' jurisdictional limits are related to geography; geography, however, is a virtually meaningless construct on the Internet.").

impossible the very type of interstate commercial activity most significantly enhanced through e-commerce.

The specific barriers in question here and their counterparts in other states have dramatically stunted the sale and purchase of wine over the Internet. In its recent report on state barriers to e-commerce in the wine industry, the Federal Trade Commission (FTC) notes that "[s]tate bans on interstate direct shipping represent the single largest regulatory barrier to expanded e-commerce in wine." *FTC Study*, at 3.

Although the regulations challenged in this case arise in the context of the sale of wine, they are similar to barriers erected by states with regard to other products, where dubious consumer-protection rationales have been used to block online competition from out-of-state sellers. In its recent decision dealing with state barriers to casket sales, the 10th Circuit concluded, "While baseball may be the national pastime of the citizenry, dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments." *Powers v. Harris*, 2004 U.S. App. LEXIS 17926, at *35 (10th Cir. Aug. 23, 2004).

For example, at the urging of state-licensed ophthalmologists, a number of states have sought to discourage the online sale of disposable contact lenses through a variety of discriminatory mechanisms. These include prohibiting customers from getting access to their prescriptions, restricting contact lens sales to only face-to-face transactions, and artificially shortening the length of a contact lens' prescription life-span in order to force consumers to have their eyes checked more frequently, and to purchase new contact lenses from their local eye-care providers. *See, e.g.*, Fed. Trade Comm'n, *Public Workshop:*

*Possible Anticompetitive Effects to Restrict Competition on the Internet*, Tr. at 321, *et seq.* (Oct. 9, 2002), *available at* http://www.ftc.gov/opp/e-commerce/anticompetitive/021009antitrans.pdf [hereinafter *FTC Workshop*]. *See also Commerce Committee Hearing*, at 26-27.

As another example, some states have placed onerous restrictions on the sale of caskets, such as requiring residents to purchase caskets only from state-licensed funeral directors. *See, e.g., FTC Workshop*, at 459 *et seq.* This can be a substantial burden for online sellers, who must spend significant time and money to become licensed funeral directors in order to comply with state regulation. *See Craigsmiles v. Giles*, 312 F. 3d 220 (6th Cir. 2002) (finding that Tennessee's prohibition against the retail sale of caskets by anyone but licensed funeral directors was not rationally related to a legitimate state interest). *But see Powers*, 2004 U.S. App. LEXIS 17926, at *6, *10 (upholding, against challenges unrelated to the Commerce Clause, Oklahoma's prohibition against intrastate online casket sales by anyone but licensed funeral directors).

Although these situations involve different products,[3] they share a common trait: as in the cases currently before the Court, parochial business interests have used protectionist state legislation in an attempt to insulate themselves from the interstate competition that e-commerce permits. *See, e.g., Giles*, 312 F.3d at 225 (describing restrictions on casket sales as "nothing more than an attempt

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[3] Besides caskets and contact lenses, protectionist state barriers against e-commerce have been identified with respect to a number of other products, including automobiles, and for some services, such as real estate, mortgages, and financial services. *See Commerce Committee Hearing*, at 2 (statement of Rep. Cliff Stearns). *See also FTC Study*, at 2 n.3.

to prevent economic competition," and describing the state's justifications as frivolous); *Commerce Committee Hearing*, at 22-23 (describing resistance to online sales of contact lenses by eye doctors, even though many alternative ways to address health and safety concerns existed).

While Congress certainly could, and sometimes does, exercise its affirmative Commerce Clause powers to prevent this kind of discriminatory state regulation,[4] it cannot possibly keep track of or act to repel the constant pressure for anti-competitive state legislation. The dormant Commerce Clause operates as the structural bulwark and guardian of the national market-place against the natural tendencies of local interests to capture the machinery of state government to advantage themselves and burden their distant, widely-dispersed competitors. This Court has made clear that, even where Congress has not chosen to act, the Commerce Clause operates to prevent the kind of economic Balkanization that would result from unchecked state discrimination against interstate commerce. *See, e.g., Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 595 (1997) ("The history of our Commerce Clause jurisprudence has shown that even the smallest scale discrimination can interfere with the project of our federal Union. As Justice Cardozo recognized, to countenance discrimination ... would invite significant inroads on our "national solidarity") (internal citation omitted); *Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources*, 504 U.S. 353, 359 (1992) ("As we have long recognized, the 'negative' or 'dormant' aspect of the Commerce Clause prohibits States from 'advancing their own commercial interests by curtailing the movement of articles of commerce,

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[4] Congress has exercised its Commerce Clause authority with respect to contact lenses by passing the Fairness to Contact Lens Consumer Act, 15 U.S.C. §§ 7601-7610 (2004), which prohibits anti-competitive activities surrounding contact lens sales.

either into or out of the state.'") (internal citation omitted); *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979).

Nor is the rationale of the dormant Commerce Clause purely economic. By refusing to countenance local protectionism, the Commerce Clause reins in the natural tendency to parochialism in local policymaking, and provides incentives for legislators to consider broader public concerns. Thus, like the Privileges and Immunities Clause, U.S. Const. art. IV, § 2, cl. 1, the Commerce Clause reinforces the structural integrity of the Union created by the Constitution, another reason why its goals have long been considered the "object riding over every other in the adoption of the constitution." *Gibbons v. Ogden*, 22 U.S. 1, 231 (1824) (Johnson, J., concurring).

## II. MICHIGAN'S DISCRIMINATORY LICENSING SCHEME VIOLATES THE DORMANT COMMMERCE CLAUSE.

The Sixth Circuit employed the correct analytical approach in striking down Michigan's discriminatory prohibition of interstate wine sales. It used the two-step process previously employed by this Court in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 274 (1984): first, determining whether the state's discriminatory regulation would violate the dormant Commerce Clause if alcoholic beverages were not involved; and second, if it would, whether the Twenty-first Amendment saves the otherwise unconstitutional law. *Heald v. Engler*, 342 F.3d 517, 524 (6th Cir. 2003), *cert. granted sub nom. Granholm v. Heald*, 124 S. Ct. 2389 (2004). *See also, e.g., Healy v. Beer Inst.*, 491 U.S. 324, 342-43 (1989) (refusing to uphold price affirmation on Twenty-first Amendment grounds after engaging in Commerce Clause analysis); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S.

573, 584 (1986) (applying two-step analysis and rejecting argument that Twenty-first Amendment immunizes state statutes from Commerce Clause scrutiny).

Here, the answer to the first inquiry is straightforward: Michigan's discriminatory scheme would certainly violate the dormant Commerce Clause if applied to commerce in any product other than alcoholic beverages. Even those courts that have upheld discrimination like that involved in this case have readily conceded its invalidity in the absence of the Twenty-first Amendment. *See Swedenburg v. Kelly*, 358 F.3d 223, 238 (2d Cir. 2004), *cert. granted*, 124 S. Ct. 2391 (2004) ("We fully recognize that the physical presence requirement [of New York's alcohol regulation] could create substantial dormant Commerce Clause problems if this licensing scheme regulated a commodity other than alcohol."); *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 851 (7th Cir. 2000) ("If the product were cheese rather than wine, Indiana would not be able. . . to close its borders").

### *A. Statutes That Discriminate Against Interstate Commerce Are Virtually Always Invalid Under The Dormant Commerce Clause.*

Michigan's discrimination against out-of-state sellers offends deeply rooted Commerce Clause principles. The incorporation of the Clause into the Constitution reflected the Founders' acknowledgement that states could become captive to local interests to the detriment of the nation as a whole. *See The Federalist* No. 7 (Alexander Hamilton). In recognition of this core principle, the Court has held that statutes that discriminate against interstate commerce in purpose or effect are virtually *per se* invalid. *See, e.g., Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). "The

central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent." *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994) (citing *The Federalist* No. 22, at 143-145 (Alexander Hamilton) (Clinton Rossiter ed., 1961) and James Madison, *Vices of the Political System of the United States*, *in Writings of James Madison* 362-363 (Gaillard Hunt ed., 1901)). "The evil of protectionism can reside in legislative means as well as legislative ends." *New Jersey*, 437 U.S. at 626.

If a state statute treats in-state and out-of-state actors differently in a way that favors the in-state interests and disfavors out-of-state interests, that regulation is discriminatory for dormant Commerce Clause purposes. *See Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of Ore.*, 511 U.S. 93, 99 (1994). Here, Michigan's statutory scheme permits in-state wineries to sell their products directly to consumers over the Internet, as some of them do. *See Heald v. Engler*, 342 F.3d at 521[5] In contrast, out-of-state wineries may not sell directly to consumers, over the Internet or otherwise, but may sell to Michigan consumers only through Michigan wholesalers and retailers.[6] *See, e.g.*, Mich. Comp.

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[5] *See also, e.g.*, Chateau Grand Traverse, *at* http://www.cgtwines.com (Michigan winery advertising over the Internet and accepting phone, fax, and mail orders), (last visited Sept. 21, 2004); Chateau Chantal, *at* http://www.chateauchantal.com (Michigan winery shipping directly to consumers but requiring an adult signature on delivery) (last visited Sept. 21, 2004); Contessa Wine Cellars, *at* http://www.contessawinecellars.com (shipping within Michigan and accepting online orders) (last visited Sept. 21, 2004).

[6] Like many states, Michigan has set up a three-level system of alcohol distribution, similar to that established by many states after the repeal of prohibition. Suppliers may sell only to licensed wholesalers; wholesalers may sell only to licensed retailers; and only licensed retailers

Laws § 436.1203 (2004) (prohibiting out of state wine sellers from selling directly to consumers); *Heald*, 342 F.3d at 521 (explaining the Michigan restrictions and quoting the Michigan Liquor Control Commission for the statement that "there is no procedure whereby an out-of-state retailer or winery can obtain a license or approval to deliver wine directly to Michigan residents."). This differential treatment ensures that out-of-state wineries have severely reduced access to Michigan customers and that those wineries must share revenues with middlemen, thus reducing profits and increasing prices to consumers, as compared with the price of Michigan wines. *See Bainbridge*, 311 F. 3d at 1106-07; *cf. Beskind v. Easley*, 325 F.3d 506, 520 (4th Cir. 2003) (noting that direct shipping ban increases access only to wine produced in-state).

Like the other courts of appeals that have held similar out-of-state shipping bans unconstitutional,[7] the Sixth Circuit correctly found that Michigan's statutory scheme is discriminatory. *Heald*, 342 F.3d at 527-28. The presence of that discrimination requires the state to demonstrate the absence of nondiscriminatory means to advance the state's legitimate purposes. *See, e.g., id.; Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). That is a showing that Michigan has failed to make.

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– and, tellingly, Michigan-based wineries – may sell to consumers. All retailers, including Michigan direct shippers, must have a presence in the state. Thus the Michigan system is also biased towards offline "brick-and-mortar" transactions, and against those carried out online.

[7] *See, e.g., Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003) (finding North Carolina's restriction on out-of-state direct shipping to be discriminatory); *Bainbridge v. Turner*, 311 F.3d 1104 (11th Cir. 2002) (striking down discriminatory Florida law that prohibited the use of common carriers to deliver wine, but permitted in-state wineries to have their own delivery fleets).

Even if Michigan were to adjust its system, as New York has done, *see Swedenburg v. Kelly*, 358 F.3d 223, 238-39 (2d Cir. 2004), to allow direct sales by any licensed entity with a physical presence in the state, it would not change the fundamentally discriminatory character of its regime, and would not save it from invalidity under the Commerce Clause. Physical presence requirements, while facially neutral, clearly discriminate against online sellers by raising their costs. To require a vintner to establish an office in New York as a precondition to allowing Internet sales to be fulfilled by direct shipment from the vineyard in California is economically irrational, and serves only to eliminate "one of the main efficiency benefits of e-commerce, the ability to provide goods and services over large distances without the need for a substantial, far-flung physical presence." Letter from Todd J. Zywicki, Director, Office of Policy Planning, Federal Trade Commission, to William Magee, Chairman, Assembly Agriculture Committee of the State of New York 13 (March 29, 2004), *available at* http://www.ftc.gov/be/v040012.pdf. The inescapable clash between physical presence requirements and the Commerce Clause's core objective of promoting growth of national markets renders this species of protectionist discrimination, which weighs most heavily on e-commerce participants, just as objectionable as the facial discrimination practiced by Michigan. *See Halliburton Oil Well Cementing Co. v. Reilly*, 373 U.S. 64, 72 (1963) (a state cannot require an out-of-state company to "become a resident in order to compete on equal terms.").

### *B. Michigan Has Failed To Demonstrate that It Has No Nondiscriminatory Means of Advancing Its Legitimate State Interests.*

Facially discriminatory statutes such as Michigan's receive the highest level of judicial scrutiny. *See, e.g.*,

*Hughes*, 441 U.S. at 337 ("At a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives."). The Court routinely refers to such statutes as being virtually *per se* invalid. *See New Jersey*, 437 U.S. at 624, reflecting the fact that nondiscriminatory means almost always exist to accomplish legitimate state objectives. Here, petitioners offer only two substantive rationales to support its discriminatory system: revenue collection and the protection of minors. *See* Wholesalers' Br. at 7, 13; Mich. Br. at 33. The state, however, has readily available nondiscriminatory means to address each of these legitimate interests.

### 1. Michigan Has Available Nondiscriminatory Means of Collecting Taxes on Wine.

Alone, "revenue generation is not a local interest that can justify discrimination against interstate commerce." *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 393 (1994). Michigan has a legitimate interest in taxing the consumption of wine in Michigan, regardless of where the wine originates, but it does not need to discriminate against interstate commerce in order to do so.

A number of nondiscriminatory means exist through which states can and do impose taxes in connection with direct sales of wine to consumers from out-of-state vendors. The recent study by the FTC found that most of the states that permit direct shipments of wine to consumers have, in fact, reported no significant problems with tax collection as a result of that practice. *See FTC Study*, at 4. Michigan could, for example, impose a non-discriminatory tax payable by all

in-state direct purchasers (whether from in-state or out-of-state wineries) along with nondiscriminatory reporting requirements on all direct sellers that would facilitate the identification of those purchasers. Michigan might follow the lead of other states that require delivery services such as FedEx to provide periodic reports of wine shipments to interstate consumers. *See FTC Study*, at 36-37. Alternatively, nondiscriminatory licensure requirements that would assist in revenue collection could be imposed on all direct sellers.[8] Congress has provided states with legal tools specifically designed to assist them in enforcing these and similar requirements even outside their borders. *See* Twenty-first Amendment Enforcement Act, 27 U.S.C. § 122a (2004) (giving states extra-territorial authority to sue out-of-state violators of distribution and importation laws in federal court).[9] Without full consideration of these alternatives, Michigan cannot meet its dormant Commerce Clause burden of showing a need for facially discrimination against interstate commerce.

### 2. Michigan Has Available Nondiscriminatory Means of Preventing Minors from Buying Wine.

The state's undoubtedly legitimate interest in protecting minors can also be satisfied through nondiscriminatory means. Petitioners argue that the Internet threatens states with "being flooded" in a sea of unregulated

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[8] However, as explained above, any requirement that licensees establish a physical presence in the state would overstep into the discriminatory realm that runs afoul of the core goals of the Commerce Clause.

[9] The Act's legislative history shows that it was enacted for the specific purpose of giving states additional law enforcement tools for collecting taxes on liquor sales and preventing sales to minors. *See* H.R. Rep. No. 106-265, at 5 (1999).

alcohol from out-of-state sources and attendant juvenile drinking problems. Wholesalers' Br. at 38; *see also* Mich. Br. at 33. The analysis by the FTC, however, suggests otherwise: "*The states that permit interstate direct shipping generally report few or no problems with shipments to minors.*" *FTC Study*, at 4 (emphasis added).[10] Michigan's position, moreover, is belied by the fact that Michigan permits its own wineries to sell directly to consumers over the Internet, or by phone, fax or mail, thus creating the same "problem" that it invokes to justify prohibition of out-of-state direct sales. In all events, nondiscriminatory means are readily available to the State, such as requiring an adult signature upon delivery. *See* Mich. Comp. Laws § 436.1203 (2004); Mich. Admin. Code r. 436.1527 (2004); Mich. Br. at 8. The common carriers that deliver direct wine purchases are fully subject to the jurisdiction of the state for violation of such a requirement.

## III. THE TWENTY-FIRST AMENDMENT DOES NOT SAVE MICHIGAN'S DISCRIMINATORY STATUTORY SCHEME FROM A FINDING OF UNCONSTITUTIONALITY UNDER THE DORMANT COMMERCE CLAUSE.

Petitioners make no effort to justify Michigan's facially discriminatory alcoholic beverage regime as

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[10] In testimony to the Federal Trade Commission, Michigan did report instances of interstate sales of wine to minors. *Id.* at 35. Michigan gathered this data by using minors in a sting operation. It does not follow that because a minor might order an out-of-state case of wine over the Internet, he or she is likely to do so (rather than buying a six-pack of beer locally). *See, e.g., FTC Study* at 32, App B. (California regulator testimony to that state legislature's committees on the wine industry, stating that "I do believe the sale-to-minor issue is overblown," and suggesting that a minor intent on purchasing alcohol would not do it through mail orders).

indispensable to effectuate the state's legitimate interests. They argue instead that, as a consequence of the adoption of Section 2 of the Twenty-first Amendment, no justification for Michigan's discrimination against interstate commerce is constitutionally required. The state petitioners thus argue that, "a state is *totally unconfined* by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders." Mich. Br. at 26 (emphasis added). Wholesaler petitioners similarly argue that under the Twenty-first Amendment, states "may impose any regulation of physical importation without offending the Commerce Clause if there is any reasonably conceivable state of facts that could provide a rational basis for the regulation." Wholesalers' Br. at 14.

This position is untenable. The state regulation of alcohol does not free the state from all meaningful constitutional restraints on its ability to favor in-state economic interests by discriminating against interstate commerce. The Twenty-first Amendment creates no such license to discriminate. Indeed, a law's "discriminatory character eliminates the immunity afforded by the Twenty-first Amendment." *Healy v. Beer Inst.*, 491 U.S. at 324 (Scalia, J., concurring). The Amendment's purpose was "to allow states to prohibit the importation of alcohol, at least *through laws of a suitably nondiscriminatory sort*." 1 Laurence H. Tribe, American Constitutional Law 1167 (3rd ed. 2000) (emphasis added). A state may use its authority under the Amendment to prevent out-of-state merchants from frustrating state temperance or regulatory policies by engaging in conduct that the state has lawfully forbidden to in-state merchants; it may not use that authority to prohibit interstate transactions on alcohol that it has chosen to permit within its borders.

### *A. The Purpose of the Twenty-first Amendment Was to Permit the States to Be Dry, Soaking Wet, or Somewhat Damp, Not To Permit States To Favor Local Interests By Discriminating Against Out-Of-State Producers.*

This Court has characterized assertions that the Twenty-first Amendment gives states a blanket exemption from the dormant Commerce Clause as "patently bizarre and demonstrably incorrect." *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 109 (1980) (quoting *Hostetter v. Idlewild Liquor Corp*, 377 U.S. 324, 331-32 (1964)). Although early Twenty-first Amendment cases such as *State Bd. of Equalization of Cal. v. Young's Market*, 299 U.S. 59 (1936) appeared to describe a broad, virtually unqualified state power to regulate liquor, the Court has clearly withdrawn from that position. The view "that the Twenty-first Amendment has somehow operated to repeal the Commerce Clause wherever regulation of intoxicating liquors is concerned [is] an absurd oversimplification." *Hostetter*, 377 U.S. at 331-32.[11]

In resolving asserted conflicts between the Twenty-first Amendment and the Commerce Clause, courts must proceed from the premise that "[b]oth the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete

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[11] Indeed, the Court has found that a number of constitutional provisions limit state power under the Twenty-first Amendment. *See, e.g., Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971) (due process clause); *Dep't of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 344 (1964) (export-import clause); *Bacchus*, 468 U.S. at 276 (commerce clause); *Craig v. Boren*, 429 U.S. 190, 209 (1976) (equal protection clause).

case." *Id.* The two constitutional provisions are correctly reconciled by recognizing that the central purpose of the Twenty-first Amendment was "controlling liquor consumption *regardless of the state or nation from which the liquor might come*." Tribe, *supra*, at 1170 (emphasis added). Favoring local industries was not part of that purpose and thus "was not protected by it." *Id.* The Twenty-first Amendment thus permits the states to decide to be dry, soaking wet, or somewhat damp; it does not permit them to apply different temperance policies depending upon the *source* of an alcoholic beverage.[12] As this Court has explicitly recognized, "[d]oubts about the scope of the Amendment's authorization notwithstanding, one thing is certain: The central purpose of the provision was not to empower states to favor local liquor industries by erecting barriers to competition." *Bacchus Imports Ltd. v. Dias*, 468 U.S. at 263, 276.[13]

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[12] Petitioners seek support for their position in the legislative history of the Amendment. The Court, however, has noted that despite the legislative history's "obscurity," it provides support for the view that the amendment permits the states to be wet or dry, but not to engage in discrimination. *See Midcal*, 445 U.S. at 106-107 n.10.

[13] The discriminatory features of Michigan's regulatory regime may reflect the efforts of Michigan's wine industry. The industry contributes $75 million to the Michigan economy, $17 million of which comes from tourists who visit the wineries. *See* Michigan Grape & Wine Industry Council, *Michigan Wine Industry Honors Quarter-Century of Growing Wines*,(March 18, 2003), *at* http://www.michiganwines.com/Media/news/03182003.html. It is the 13th largest wine producer in the United States in terms of volume, and fourth in terms of the amount of land dedicated to wine production. *See* Michigan Grape & Wine Industry Council, *Fast Facts, at* http://www.michiganwines.com/Fast_Facts/fastfacts.html (last visited Sept. 21, 2004).

### *B. The Advent of the Internet Does Not Justify State Discrimination Against Interstate Commerce.*

Petitioners invoke the development of the Internet as a post-hoc rationalization for its discrimination, claiming that "[e]lectronic commerce makes it conceivable that large amounts of alcohol could be sold via direct shipment," Wholesalers' Br. at 38, and that holding the State's discriminatory ban unconstitutional presents "new legal obstacles to enforcement." *Id.* *See also* Mich. Br. at 33. That fear has no empirical support. *See generally FTC Study*, at 4. More fundamentally, the success of a national marketplace certainly cannot be used as a justification for state discrimination against it. States could have, moreover, made the same argument about the development of mail-order commerce, or the introduction of marketing by telephone or fax. The Twenty-first Amendment was certainly not intended to bar commerce via modern means of communication and delivery.

*Amici* do not contest here the state's power to require *all* commerce in alcohol to follow the same rules. Michigan, however, has not taken that course, but has chosen to permit intrastate direct sales to consumers through any technological means, while prohibiting all interstate direct sales. That "selective approach... suggests limits on the substantiality of the interests [Michigan] asserts here." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 715 (1984). The Sixth Circuit correctly ruled that a state cannot engage in this sort of unjustified and unjustifiable discrimination. Its decision underscores the crucial role of the dormant Commerce Clause in advancing the paramount value of a national market - epitomized by e-commerce - that surmounts protectionist hurdles. It should be affirmed.

## CONCLUSION

The decision of the Court of Appeals should be affirmed.

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# Supreme Court of the United States

JENNIFER M. GRANHOLM, Governor, et al.,

*Petitioners,*

v.

ELEANOR HEALD, et al.

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,

*Petitioner,*

v.

ELEANOR HEALD, et al.

**On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## BRIEF FOR THE CARGO AIRLINE ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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## INTEREST OF *AMICUS CURIAE*

The Cargo Airline Association (CAA) is a trade association of fifteen interstate air carriers and motor carriers affiliated with air carriers through common controlling interest, including United Parcel Service and FedEx Express, which transport only cargo.[1]

Cargo transportation is the engine that drives the nation's interstate commerce. It is critically important to the economy. As of the last economic census, for-hire air and motor carriers transported more than 3.6 billion tons of goods, valued in excess of $4 trillion. *See* U.S. Census Bureau, U.S. Dep't of Commerce, *2002 Economic Census: Transportation: 2002 Commodity Flow Survey: United States (Preliminary)*, at 8 tbl. 1a (2003).

Carriers are able to provide the timely, efficient, and reliable service on which the modern economy relies only by employing uniform processes for handling, transporting, and delivering packages. It is therefore critical to the effective functioning of carriers' delivery operations that those operations be subject to uniform, national laws throughout the United States, as Congress has directed in the Federal Aviation Administration Authorization Act of 1994 (FAAAA), Pub. L. No. 103-305, tit. VI, § 601, 108 Stat. 1569, 1605-1607. *Amicus* CAA's members, and their customers, bear the burdens of divergent state laws that seek to regulate carriers' delivery of specific items.

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[1] A letter from the parties consenting to the filing of this brief has been filed with the Clerk of this Court, pursuant to Supreme Court Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

The Michigan laws at issue in these cases, and the New York laws at issue in *Swedenburg v. Kelly*, No. 03-1274, directly regulate carriers' deliveries. Because *amicus* CAA's members depend on nationally-uniform rules in operating their businesses, the CAA has a significant interest in the outcome of these cases.

## SUMMARY OF ARGUMENT

The state laws at issue in these cases regulate not only the buyers and sellers of wine, but also the carriers that transport the wine, along with other goods, to and within Michigan. These laws directly regulate carriers by proscribing delivery of alcohol to unauthorized recipients. The parties apparently assume that the federal rights of carriers are derivative of and coextensive with those of the buyers and sellers. But that assumption is in error. Carriers have been afforded special protection from state regulation by federal statute, as well as under this Court's Commerce Clause jurisprudence.

Although the Michigan laws regulating carriers at issue in these cases are invalid, many of *amicus* CAA's members offer shippers the option of requiring an adult signature for delivery. Moreover, the federal government remains available to address any untoward conduct by carriers.

A. The Federal Aviation Administration Authorization Act of 1994 (FAAAA), Pub. L. No. 103-305, tit. VI, § 601, 108 Stat. 1569, 1605-1607, is critical to the proper resolution of these cases. The FAAAA preempts state laws "related to a price, route, or service" of air and motor carriers that transport property. The judgment below should be affirmed on the ground that the Michigan laws at issue are preempted by the FAAAA.

Congress enacted the FAAAA to reaffirm and expand its earlier preemption of state laws regulating air carriers in the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705. Congress enacted the FAAAA's preemption provisions because it determined that the existing patchwork of state regulation of carrier operations "imposed an unreasonable burden on interstate commerce." FAAAA § 601(a)(1), 108 Stat. at 1605.

The FAAAA preempts Michigan's laws regulating carriers' deliveries. A carrier's delivery of the property it transports is a core part of the carrier's "service," which cannot be regulated by state or other local laws. The state laws also relate to a carrier's routes because compliance requires special routing of packages containing alcohol, including re-routing of non-complying packages to be returned to shippers, and may require changes to delivery drivers' routes to account for the increased amount of time necessary to conform to restrictions on the manner of deliveries. Finally, these laws relate to a carrier's prices because the costs of compliance can substantially increase the costs for carriers to transport and deliver goods.

The Twenty-first Amendment does not invalidate the FAAAA. Congress enacted the FAAAA's preemption provisions pursuant to its Article I power to regulate interstate commerce. This Court has held in three cases that federal statutes enacted pursuant to the Commerce Clause preempted state laws regarding alcohol despite claims by the States that the Twenty-first Amendment authorized the laws. *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987); *Capital Cities Cable v. Crisp*, 467 U.S. 691 (1984). While there is language in these cases that suggests the Court was seeking to "balance" federal and state interests, this balance appears no different from standard application of the

Supremacy Clause, in which the federal government must prevail. Certainly, if, as in *Crisp*, a federal policy in favor of access to cable television can trump a State's interest in promoting temperance, then a federal policy in favor of unfettered national commercial markets for the transportation of property likewise must supercede state laws that are motivated by a combination of temperance and economic protectionism. To hold otherwise would draw into question not only the FAAAA, but also other federal laws, such as recently enacted public-safety legislation designed to reduce the number of bulky packages that passengers carry onto airplanes by authorizing the direct shipment of on-site purchases of wine to consumers who could have lawfully carried the wine into the State. *See* 27 U.S.C. § 124.

Nothing in the Twenty-first Amendment's legislative history reflects an intent to limit Congress's authority to regulate commerce pursuant to the Commerce Clause. To the contrary, the debates show that Congress's rejection of a proposed Section 3 of the Amendment, which would have granted it express authority to regulate the sale of liquor on the premises where sold, was based in part on the understanding that Congress's existing authority to regulate liquor under the Commerce Clause was not affected.

B. If the Court does not reach the FAAAA preemption argument, the judgment below should be affirmed on respondents' claim that the Michigan laws' facial discrimination against out-of-state products falls within the Dormant Commerce Clause's virtually *per se* rule of invalidity. Moreover, claims under the Dormant Commerce Clause involving undue burdens on interstate commerce should not be foreclosed in cases such as these involving state regulation of the delivery of alcohol.

This Court has never adopted the view, urged by petitioners, that state laws regarding the transportation of

liquor can never be invalidated under the Dormant Commerce Clause, regardless of the burden on interstate commerce. To the contrary, this Court has held that nothing in the text of Section 2 of the Twenty-first Amendment exempts state laws from Dormant Commerce Clause scrutiny. *See Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Healy v. Beer Inst.*, 491 U.S. 324 (1989). The Court should not retreat from these holdings.

Even if this Court were to reject respondents' claims of unconstitutional discriminatory treatment, serious questions would remain concerning the constitutionality of the burden that state laws regulating deliveries of alcohol impose on interstate carriers under the Dormant Commerce Clause. This Court has long recognized that the Clause's proscription against economic balkanization is often violated by state laws directly regulating interstate carriers' transportation of property, a determination confirmed by Congress in enacting the FAAAA.

Michigan's laws can impede the flow of interstate commerce because they disrupt carriers' operations, increase costs, and slow service. Several States forbid carriers from making certain deliveries of alcohol either to unauthorized recipients or from unlicensed shippers, with the determination of who is unauthorized or unlicensed varying among the States. The inefficiencies and delays caused by such state laws may constitute an undue burden on interstate commerce in violation of the Commerce Clause that could not be sustained unless supported by important state interests that justify the burden. Nothing in the Twenty-first Amendment requires this Court to sanction unlimited balkanization of the national market when the product being carried is alcohol.

## ARGUMENT

Petitioners, Michigan state officials and a trade association of Michigan beer and wine wholesalers, ask this Court to uphold state laws that regulate not only the buyers and sellers of wine, but also directly regulate carriers (including trucks and aircraft) that transport the wine, along with other goods, to and within Michigan. The Michigan laws restrict the "delivery" of alcohol to state licensees and forbid "delivery" to an individual under most circumstances. Mich. Comp. Laws § 436.1203(1). Even when they do allow direct delivery to individuals, the laws require "[t]he person who delivers the alcoholic liquor" to "verify that the individual accepting delivery is of legal age" through a "diligent inquiry," which is defined to include "at least an examination of an official Michigan" drivers' license or identification card "or any other bona fide picture identification which establishes the identity and age of the person." Mich. Comp. Laws § 436.1203(4), (8)(f). The laws are enforced through criminal penalties against delivery persons and others. *See* Mich. Comp. Laws §§ 436.1909, 436.1701(1).

The New York state laws that are before the Court in the companion case consolidated for argument, *Swedenburg v. Kelly*, No. 03-1274, likewise directly regulate carriers by forbidding a "common carrier or other person" from "bring[ing] or carry[ing] into the state any alcoholic beverages, unless the same shall be consigned to a person duly licensed hereunder to traffic in alcoholic beverages." N.Y. Alco. Bev. Cont. § 102(d).

The constitutional challenge in this action was brought by persons who wish to buy wine from sellers outside of their State and the out-of-state sellers who wish to sell and ship directly to those persons. None of the parties addresses the carriers who transport the wine from the sellers to the buyers, or the provisions of the

challenged state laws that directly regulate carriers' deliveries of wine purchased from the out-of-state sellers. The parties apparently assume that the federal rights of carriers are derivative of and coextensive with those of the buyer and seller. But that assumption is in error. Carriers have been afforded special protection from state regulation by federal statute, as well as under this Court's Commerce Clause jurisprudence.

Although the Michigan laws regulating carriers at issue in these cases are invalid, many of *amicus* CAA's members offer shippers the option of requiring an adult signature for delivery. *See* Federal Trade Comm'n, *Possible Anticompetitive Barriers to E-Commerce: Wine* 36-37 (2003).

Moreover, the federal government remains available to address any untoward conduct by carriers. Despite broad federal deregulation, air carriers must obtain from the federal government a certificate authorizing air transportation before providing interstate cargo service. *See* 49 U.S.C. § 41101(a). The federal government may impose such terms on the certificate as are in the public interest, *see id.* §§ 41103(c), 41109(a)(2)(A), with certain exceptions regarding pricing, scheduling, destinations, and the like, *see id.* §§ 41103(c), 41109(a)(2)(B); *see also id.* § 40101(a)(6), (b)(2) (describing the deregulatory market-based purposes government must consider in assessing the public interest). The federal government has also established an administrative mechanism to police "unfair" or "deceptive" practices by air carriers while allowing them to engage in interstate commerce governed by national rules. *See* 49 U.S.C. § 41712; *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 228 n.4 (1995).[2]

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[2] The federal government also regulates those entities that produce and ship alcohol. *See* 27 U.S.C. §§ 203, 205. Accordingly, the States need not regulate the carriers that transport and deliver the shipments

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### A. The FAAAA, As An Exercise Of Congress's Authority Under The Interstate Commerce Clause, Preempts State Laws That Regulate The Prices, Routes, Or Services Of Carriers Of Property, Including Laws That Regulate Deliveries Of Alcohol

Federal law exclusively governs carriers' transportation of property by land and air in both interstate and intrastate commerce. Congress enacted the Federal Aviation Administration Authorization Act of 1994 (FAAAA), Pub. L. No. 103-305, tit. VI, § 601, 108 Stat. 1569, 1605-1607, to create and encourage an efficient and competitive national market for the transportation of goods. The FAAAA preempts state laws related to the prices, routes, or services of air carriers, motor carriers, and intermodal carriers (*i.e.*, carriers that use a combination of both air and motor transportation) that transport property. *See* 49 U.S.C. §§ 41713(b)(4)(A), 14501(c)(1). The FAAAA is critical to the proper resolution of these cases because it reflects Congress's determination that States should be divested of virtually all authority to regulate the commercial transportation of property, including the deliveries of wine purportedly regulated by the state laws at issue in these cases. The judgment below should be affirmed on the ground that the Michigan laws at issue are preempted by the FAAAA.[3]

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because the federal government already regulates the terms upon which entities are permitted to ship alcohol and can adjust such regulation to address other concerns.

[3] Although the parties did not raise this statutory preemption argument below, this Court has the authority to consider it. *See Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 382 n.6 (1983). Indeed, it is particularly appropriate to address the statutory preemption argument because the question presented involves the Dormant Commerce Clause and "the relationship between legislative and judicial enforcement of the Commerce Clause is close." *Ibid.*; *see also Boynton v. Virginia*, 364 U.S. 454, 457 (1960) (electing to

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### 1. Congress Enacted The FAAAA To Eliminate A Patchwork Of State Laws Regulating Carriers That It Determined Unreasonably Burdened Interstate Commerce

Congress's decision in the FAAAA to preempt state regulation of the prices, routes, and services of air, motor, and intermodal carriers of property is rooted in a long history of federal supremacy in this field. Starting with the creation of the Interstate Commerce Commission (ICC) in 1887, *see* Act of Feb. 4, 1887, ch. 104, 24 Stat. 379, the federal government has been responsible for regulating the prices, routes, and services of the interstate carriage of goods, to the exclusion of state authorities.[4]

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resolve case based on federal preemption claim not raised by petitioner rather than the Dormant Commerce Clause claim upon which *certiorari* had been granted). Moreover, by addressing the statutory question, this Court may not need to address the constitutional issue of the interplay between the Twenty-first Amendment and the Dormant Commerce Clause. *See Fry v. United States*, 421 U.S. 542, 546 (1975) (addressing statutory issues raised in *amicus* briefs but not by petitioner "rather than decide a constitutional question").

This Court adopted a similar course in *Capital Cities Cable v. Crisp*, 467 U.S. 691 (1984), where, at the urging of an *amicus*, it declined to address a First Amendment claim regarding state regulation of alcohol advertising on cable television resolved by the court of appeals and raised by petitioners in their petition for *certiorari*. The Court instead disposed of the case against petitioners on statutory preemption grounds, even though it was not passed upon by the lower courts and even though the Court was required to address the scope of the Twenty-first Amendment in doing so. *Id.* at 697.

[4] Congress created the ICC to regulate railroads in response to this Court's decision in *Wabash, St. Louis and Pacific Railway Co. v. Illinois*, 118 U.S. 557 (1886), which held that a state law that attempted to regulate the intrastate portion of a railroad's transportation of goods intended for another State violated the Dormant Commerce Clause. The ICC statute was extended in 1935 to apply to trucks and other interstate motor carriers transporting property for compensation. *See* Motor Carrier Act of 1935, Pub. L. No. 255, § 217, 49 Stat. 543, 560-561. A similarly exclusive federal regulatory regime was later established for

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Over time, Congress favored less regulation of air and motor carriers of property, determining that interstate commerce would be more efficient if transportation of goods was governed primarily by competition in the marketplace. Therefore, by 1978, Congress had eliminated most federal regulation of air transportation, and had freed air carriers, including air cargo carriers, from state regulation of *intrastate* price, routes, and services. *See* Airline Deregulation Act of 1978 (ADA), Pub. L. No. 95-504, §§ 4, 37(a), 40(a), 92 Stat. 1705, 1707-1708, 1741, 1744-1745; *Hughes Air Corp. v. Public Utilities Comm'n*, 644 F.2d 1334, 1341 (9th Cir. 1981).

Although Congress had also substantially deregulated interstate motor carriers of property, state regulation of intrastate ground transportation initially remained in place after the ADA. In 1994, however, Congress determined that it was necessary to extend express preemption of state laws related to the prices, routes, or services of carriers engaged in the intrastate transportation of property, whether by ground, air, or some combination thereof, because of the adverse effects such state laws had on interstate commerce. As explained by the Conference Committee Report accompanying the FAAAA, the U.S. Department of Transportation had estimated that state regulation imposed costs of $3 to $8 billion a year on motor carriers and the public. H.R. Conf. Rep. No. 103-677, at 87 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1759. State regulation of carrier operations that had survived ADA preemption "cause[d] significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtail[ed] the expansion of markets." *Ibid.*

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air carriers traveling between States. *See* Civil Aeronautics Act of 1938, Pub. L. No. 706, § 403(a), 52 Stat. 973, 992-993 (authorizing regulation of interstate air carriers by the Civil Aeronautics Authority).

Moreover, the different rules governing interstate and intrastate deliveries created perverse incentives for shipping goods across state lines and then back into the State of origin simply to avoid state regulation. *Id.* at 87-88.

The state laws also directly interfered with interstate commerce because the "sheer diversity of these regulatory schemes is a huge problem for national and regional carriers attempting to conduct a standard way of doing business." *Id.* at 87.[5] Preemption was thus "necessary to facilitate interstate commerce" by eliminating the "patchwork of regulation" that state laws imposed on carriers transporting property. *Ibid.* Congress made express statutory findings in enacting the FAAAA that "the regulation of intrastate transportation of property by the States has – (A) imposed an unreasonable burden on interstate commerce; [and] (B) impeded the free flow of trade, traffic,

[5] *See, e.g., Legislation to Preempt State Motor Carrier Regulations Pertaining to Rates, Routes, and Services: Hearing Before the Subcomm. on Surface Transp. of the House Comm. on Public Works and Transp.*, 103d Cong., 2d Sess. 21 (1994) (testimony of Frank E. Kruesi, Asst. Sec., U.S. Department of Transportation) ("This is a national problem. We all bear the national expense because we purchase goods made by regional, national, and multi-national companies located in States that regulate trucking."); *ibid.* ("The very diversity of 41 [state] regulatory schemes is an additional problem for national and regional carriers which try to conduct a standard way of doing business. The States are known as the Laboratories of Democracy, but this is a case where the laboratories are not helpful to the economic well-being of our country."); *id.* at 122-123 (testimony of James A. Rogers, Vice-President, United Parcel Service) ("How big a problem is State regulation for a company like UPS? It is a big problem. * * * If we want to offer our customers a new service, we have to go to 38 PUCs in 38 different States to get them to approve the service. Every time we file one of these applications, we are at risk that they might order us to present more evidence at a hearing, [and] block service until they make a decision. We end up with a checker board map of States where some we can offer service, some we can't, and we confuse ourselves and we very much confuse our shippers.").

and transportation of interstate commerce." FAAAA, Pub. L. No. 103-305, tit. VI, § 601(a)(1), 108 Stat. at 1605.

In response to these findings, Congress concluded that "certain aspects of the State regulatory process should be preempted." *Id.* § 601(a)(2), 108 Stat. at 1605. Congress thus enacted statutory provisions in the FAAAA preempting state regulation of the transportation of property by all motor carriers, air carriers, and intermodal carriers. For example, Section 601(b) of the FAAAA provides:

> a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle (whether or not such property has had or will have a prior or subsequent air movement).

49 U.S.C. § 41713(b)(4)(A).[6]

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[6] Section 601(c) similarly preempts state laws "related to a price, route, or service of any motor carrier [not affiliated with a direct air carrier] * * * with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). Because the preemption language in Section 601(c) regarding motor carriers is identical to that discussed in the text in Section 601(b) regarding air and affiliated carriers, and because *amicus* CAA's members are all air carriers or motor carriers affiliated with air carriers, for ease of reference we refer only to Section 601(b) in discussing the FAAAA's preemptive scope. As the text of the provision demonstrates, however, Section 601(c) has comparable preemptive scope for motor carriers. *See also* H.R. Conf. Rep. No. 103-677, at 85, *reprinted in* 1994 U.S.C.C.A.N. at 1757 (FAAAA's two preemption provisions "intended to function in the exact same manner with respect to * * * preemptive effects").

Congress intended a broad scope for FAAAA preemption. Congress modeled the FAAAA on the preemption provision of the ADA, which preempted the enforcement of state laws "relating to rates, routes, or services of any air carrier having authority * * * to provide interstate air transportation." Pub. L. No. 95-504, § 4(a), 92 Stat. at 1708 (codified as amended at 49 U.S.C. § 41713(b)(1)). Based on the ordinary meaning of "relating to," as well as cases interpreting the "relates to" language of the similarly-worded ERISA preemption provision, this Court has held that "State enforcement actions having a connection with, or reference to, airline 'rates, routes, or services' are pre-empted" by the ADA. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). When Congress used this same language in the FAAAA, Congress was aware of this interpretation and said that it "d[id] not intend to alter the broad preemption interpretation adopted by the United States Supreme Court in *Morales*." H.R. Conf. Rep. No. 103-677, at 83, *reprinted in* 1994 U.S.C.C.A.N. at 1755.[7]

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[7] Subsequent to *Morales*, the broad interpretation of the "relates to" language in the ERISA preemption provision on which the *Morales* Court relied has been criticized. *See, e.g., California Div. of Labor Standards Enforcement v. Dillingham Constr., Inc.*, 519 U.S. 316, 336 (1997) (Scalia, J., concurring) (Supreme Court's "first take on [ERISA] was wrong"). Regardless of subsequent developments in ERISA preemption cases, however, Congress intended to incorporate into the FAAAA "the broad preemption interpretation" described in the *Morales* opinion. H.R. Conf. Rep. No. 103-677, at 83, *reprinted in* 1994 U.S.C.C.A.N. at 1755. Congress's choice to adopt *Morales* as the scope of FAAAA preemption must be honored, even if this Court ultimately determines that the scope of preemption recognized in *Morales* was too broad under ERISA or the ADA. In evaluating legislative intent, "the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the law was," even if "that understanding of Congress was in some ultimate sense incorrect." *Brown v. General Services Admin.*, 425 U.S. 820, 828 (1976). In all event, for the reasons discussed in the text, no matter what interpretation of the FAAAA is

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The FAAAA is clear about what is exempted from its preemptive force, specifying certain types of state laws, including those regarding: (1) safety with respect to motor vehicles; (2) highway route controls or limits based on size, weight, or hazardous materials; (3) insurance; and (4) household goods carriage (*i.e.*, transportation by specialized moving companies). *See* 49 U.S.C. § 41713(b)(4)(B); *United Parcel Serv., Inc. v. Flores-Galarza*, No. 03-1990, 2004 U.S. App. LEXIS 19370, at *7-*10 (1st Cir. Sept. 14, 2004).[6] Congress created no exception in the FAAAA for transportation of alcohol, and thus it clearly falls within the preemption provision. *See Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998) (rejecting argument that exception to broad statutory language should be created because Congress did not expressly specify that particular matter would be covered by statute).

### 2. Michigan's Regulation Of Carriers' Deliveries Is Preempted By The FAAAA

a. The Michigan laws at issue in these cases, as well as the New York laws at issue in *Swedenburg*, are preempted by the FAAAA. The state laws proscribe delivery of alcohol to unauthorized recipients (*i.e.*, delivering alcohol in these States to anyone other than persons authorized by state law to receive them). But the delivery of alcohol is a carrier service that the FAAAA protects from state regulation.

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applied, laws regulating whether and how carriers are permitted to make deliveries of alcoholic beverages are preempted.

[6] As amended, Section 601(c) regarding motor carriers contains the same exceptions and also excludes state regulation of the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle. *See* 49 U.S.C. § 14501(c)(2); *City of Columbus v. Ours Garage & Wrecker Serv.*, 536 U.S. 424 (2002).

A carrier's delivery of the property it transports is a core part of the carrier's "service," which cannot be regulated by state or other local laws. *Cf. American Airlines, Inc. v. Wolens*, 513 U.S. 219, 226 (1995) (ADA preempts state law claim that relates to airline "'services,' *i.e.*, access to flights and class-of-service upgrades unlimited by retrospectively applied capacity controls and blackout dates" arising from airline frequent flyer program); 49 U.S.C. § 13102(21)(B) (defining "transportation" for motor carriers to include "services related to [the movement of passengers or property], including * * * receipt, [and] delivery").

In an analogous situation, the First Circuit has held that the FAAAA preempts a Puerto Rico statute that "forbids delivery" to recipients who do not show the carrier proof that they have paid excise taxes on the transported goods. *United Parcel Serv., Inc. v. Flores-Galarza*, 318 F.3d 323, 335-336 (1st Cir. 2003). The court reasoned that "[c]ompliance with this provision significantly affects the timeliness and effectiveness of UPS's service, which includes the delivery of packages on an express or time-guaranteed basis." *Id.* at 336; *see also Tocher v. City of Santa Ana*, 219 F.3d 1040, 1047 (9th Cir. 2000) (FAAAA preempts municipal ordinances that imposed "operating requirements" that "directly influence the relationship between a customer and a [carrier]"), *cert. denied*, 531 U.S. 1146 (2001), *overruled on other grounds, City of Columbus v. Ours Garage & Wrecker Serv.*, 536 U.S. 424 (2002).[9]

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[9] *See also Soly v. United Parcel Serv., Inc.*, No. 02-CV-10499-MEL, 2002 U.S. Dist. LEXIS 24059, at *1-3 (D. Mass. Aug. 22, 2002) (claims arising from the delivery of packages "arise directly from core services provided by UPS, going to 'the heart of the "services" that UPS provides' "); *Rockwell v. United Parcel Serv., Inc.*, No. 99-CV-57, 1999 U.S. Dist. LEXIS 22036, at *7 (D. Vt. July 7, 1999) (claim regarding "package intake and delivery protocol is, beyond purview, inherently a claim against UPS's services which is also preempted"); *Forman v. Federal Express Corp.*, 753 N.Y.S.2d 348, 351-352 (N.Y. Civ. Ct. 2003) ("Plaintiff

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Moreover, the legislative history of the FAAAA confirms that Congress intended to preempt state laws that targeted carriers for special regulation based on the "types of commodities carried." H.R. Conf. Rep. No. 103-677, at 86, *reprinted in* 1994 U.S.C.C.A.N. at 1758.

Michigan's effort to regulate the manner of delivery, *i.e.*, how carriers may make certain deliveries, is also clearly within the scope of the FAAAA's preemption clause. *See Flores-Galarza*, 318 F.3d at 336 (FAAAA preempts statutory scheme that "imposes extensive requirements that must be met before a carrier may make a lawful delivery").

b. The Michigan and New York laws relate not just to carriers' service, but also to their routes and prices. In order to comply with the laws, *amicus* CAA's members and other carriers must create special routing for the delivery of packages containing alcohol so that the packages can be segregated and trained personnel can perform the various tasks needed to ensure compliance. Non-complying packages must be re-routed to be returned to the shipper. In addition, carriers may have to alter delivery drivers' routes to account for the increased time drivers will spend on deliveries to assure themselves that packages containing alcohol are delivered only to authorized recipients. *See Flores-Galarza*, 318 F.3d at 336 (requirements that prohibit certain deliveries or permit them only after "extensive requirements" are met create a "substantial burden"

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fails to demonstrate how the failure to deliver the contents of a package – arguably the principal service provided by Fed Ex – somehow does not relate to Fed Ex's 'services.'"); *cf. Trujillo v. American Airlines, Inc.*, 938 F. Supp. 392, 394 (N.D. Tex. 1995) (plaintiff's claims were preempted because "the acts [plaintiff] complains of – preparation of the Waybill * * * and delivery of the package – are services" within the meaning of the ADA), *aff'd mem.*, 98 F.3d 1338 (5th Cir. 1996).

in the form of additional labor, costs, and delays, and "directly and significantly affect UPS's routes and services, which depend upon an orderly flow of packages").

The state laws also relate to carriers' rates because compliance can substantially increase the costs for carriers to transport and deliver goods due to the increased costs of identifying and processing packages containing alcohol. *See id.* at 336 (costs of a scheme that imposes requirements on delivery "necessarily have a negative effect" on prices); *Federal Express v. California PUC*, 936 F.2d 1075, 1078 (9th Cir. 1991) ("To regulate [terms of service] is to affect the price."), *cert. denied*, 504 U.S. 979 (1992). Because the Michigan and New York laws relate to carriers' prices, routes, and services, the FAAAA preempts these laws.

### 3. The Twenty-first Amendment Does Not Limit Congress's Authority To Enact Federal Statutes, Such As The FAAAA, Under Its Commerce Clause Authority

The FAAAA's preemption provisions protecting the ability of air, motor, and intermodal carriers to function in a national market without state law obstacles were enacted pursuant to Congress's power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes," U.S. Const. art. I, § 8, cl. 3, in conjunction with the Necessary and Proper Clause. *See* FAAAA, Pub. L. No. 103-305, tit. VI, § 601(a), 108 Stat. at 1605 (statutory findings); *Kelley v. United States*, 69 F.3d 1503, 1508 (10th Cir. 1995) (upholding FAAAA as valid Commerce Clause legislation), *cert. denied*, 517 U.S. 1166 (1996); *Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765, 778-779 (2d Cir.) (same), *cert. denied*, 528 U.S. 868 (1999). Section 2 of the Twenty-first Amendment does not invalidate the FAAAA.

a. Shortly after the Twenty-first Amendment was ratified, this Court rejected the argument that the Amendment divested Congress of its preexisting authority over alcohol under Article I. In *William Jameson & Co. v. Morgenthau*, 307 U.S. 171 (1939) (*per curiam*), the Court considered a challenge to the Federal Alcohol Administration Act, which regulates importers, distillers, bottlers, and wholesalers of alcohol, including those shipping alcohol interstate. *See* Act of Aug. 29, 1935, ch. 814, tit. I, 49 Stat. 977 (currently codified at 27 U.S.C. § 201 *et seq.*). The federal statute was challenged on the ground that Congress had been divested of authority to regulate liquor under the Commerce Clause by the Twenty-first Amendment. This Court saw "no substance in this contention." 307 U.S. at 172-173.

At no point has this Court held that the Twenty-first Amendment insulates state laws or practices from the preemptive force of federal statutes enacted under the Commerce Clause. To the contrary, the Court has consistently rejected the view "that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned. * * * Such a conclusion would be patently bizarre and is demonstrably incorrect." *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-332 (1964).

Thus, in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), and again in *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987), the Court held that the Sherman Act's broad language preempted state laws that required fixed prices for liquor. In both cases, the Court rejected the State's argument that the Twenty-first Amendment allowed the State to disregard federal law. *See Midcal*, 445 U.S. at 113-114; *Duffy*, 479 U.S. at 352.

Similarly, in *Capital Cities Cable v. Crisp*, 467 U.S. 691 (1984), this Court held that a generally applicable federal agency regulation governing cable television preempted a state law that prohibited advertising of alcoholic beverages. The Court rejected the State's argument that the Twenty-first Amendment "rescue[s] the statute from pre-emption," explaining that, "[n]otwithstanding the Amendment's broad grant of power to the States * * * the Federal Government plainly retains authority under the Commerce Clause to regulate even * * * liquor." *Id.* at 712-713.

There is language in these cases that suggests the Court was seeking to "balance" or "harmonize" federal and state interests. *See Midcal*, 445 U.S. at 109; *Duffy*, 479 U.S. at 346; *Crisp*, 467 U.S. at 714, 716. But as the private petitioner in the instant cases acknowledges, "[i]n each case" in which "state alcohol regulations" were challenged as violations of "affirmative exercises of Congress's power under the Commerce Clause," "the federal power won." 03-1120 Pet. Br. 27. Indeed, the Court's "balance" of competing interests in cases such as *Midcal*, *Duffy*, and *Crisp* appears no different from standard application of the Supremacy Clause, in which the federal government must prevail. *Cf. Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) ("The Federal Government holds a decided advantage in this delicate balance: the Supremacy Clause. U.S. Const., Art. VI, cl. 2. As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States.").

In *Crisp*, for example, the Court accepted that the state law was "designed to further the State's interest in discouraging consumption of intoxicating liquor" and was "a reasonable, albeit limited, means of furthering the goal of promoting temperance in the State." *Id.* at 715. Yet the

Court unanimously held that "the Twenty-first Amendment does not save the [law] from pre-emption," because a federal regulation designed to ensure "diverse cable services" outweighed the State's interests. *Id.* at 715-716.

The *amicus* brief of 33 States in support of petitioners has reached this same conclusion, acknowledging that "when Congress speaks, the question is one of pre-emption under the Supremacy Clause." Br. of Ohio and 32 Other States as *Amici Curiae* 8. They explain that under this Court's cases, "Commerce Clause legislation enacted by Congress" is treated like "other constitutional limitations" with which States must comply without regard to the Twenty-first Amendment. *Id.* at 8-9.

Nor is there anything about applying the FAAAA's express preemption in the context of state laws directed at the delivery of alcohol that puts it beyond Congress's Commerce Clause authority. This Court has consistently suggested that efforts by States to regulate transportation of alcohol within their own borders can be preempted by affirmative federal law. *See United States v. State Tax Comm'n of Miss.*, 412 U.S. 363, 377 (1973) ("a State may, *in the absence of conflicting federal regulation*, properly exercise its police powers to regulate and control such [liquor] shipments during their passage through its territory" (emphasis added)); *North Dakota v. United States*, 495 U.S. 423, 439 (1990) (plurality) ("Congress has the power to confer immunity from state regulation on Government suppliers beyond that conferred by the Constitution alone, even when the state regulation is enacted pursuant to the State's powers under the Twenty-first Amendment." (citations omitted)).

Certainly, if, as in *Crisp*, a federal policy in favor of access to cable television can trump a State's interest in promoting temperance, then a federal policy in favor of

unfettered national commercial markets for the transportation of property likewise must supercede state laws that are seemingly motivated by a combination of temperance and economic protectionism. To hold otherwise would draw into question not only the FAAAA, but also other federal legislation.

For example, Congress recently enacted legislation designed to reduce the number of bulky packages that passengers carry onto airplanes now that greater precautions regarding air safety are in place. *See* 148 Cong. Rec. H6749 (daily ed. Sept. 26, 2002) (Rep. Gallegly). Congress mandated that, even though many States now forbid direct shipments of alcohol, it is lawful for consumers to receive direct shipments of wine if they purchase the wine on-site at a winery and could have carried it into their home State themselves. Specifically, Congress provided that "[d]uring any period in which the Federal Aviation Administration has in effect restrictions on airline passengers to ensure safety, the direct shipment of wine shall be permitted from States where wine is purchased from a winery, to another State" if the consumer "could have carried the wine lawfully into the State * * * to which the wine is shipped." Pub. L. No. 107-273, Div. C, tit. I, subtit. A, § 11022, 116 Stat. 1758, 1829 (codified at 27 U.S.C. § 124). Congress intended that transportation by commercial carriers would be a substitute for consumers' bringing their winery purchases onto airplanes.[10] Any suggestion that Congress lacks the power to preempt state laws regulating direct shipments of wine under its Commerce

[10] The U.S. Postal Service is not an available alternative for such shipping because Congress has forbidden the mailing of alcohol. *See* 18 U.S.C. § 1716(f).

Clause authority would have the potential for interfering with a number of substantial national interests.

b. Michigan suggests that the legislative history of the Twenty-first Amendment indicates that many (if not all) of the opinions discussed above were wrongly decided. 03-1116 Pet Br. 20-21. In particular, Michigan argues, the omission of proposed Section 3 of the Amendment, which would have granted Congress "concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold," 76 Cong. Rec. 4138 (1933), *i.e.*, to regulate "saloons," reflects an intent to preclude any federal interference with state liquor regulation. But Congress's rejection of proposed Section 3 reflects no such intention. *See Duffy*, 479 U.S. at 347 n.10 (finding no "clear demonstration of congressional intent" to "confer on States complete and exclusive control of the commerce of liquor" in the debates surrounding the Amendment).

The debates around proposed Section 3 demonstrate that members of Congress were concerned about granting the federal government any new authority, particularly one that might continue the nationalization of criminal law that had occurred during the Prohibition era. *See* 76 Cong. Rec. 4141 (1933) (Sen. Blaine); *id.* at 4177-4178 (Sen. Black); *id.* at 4220 (Sen. Reed). There is no indication, however, that Congress intended to *limit* its own existing authority to regulate commerce pursuant to the Commerce Clause.

To the contrary, several Senators explained that they supported omitting Section 3 based in part on their understanding that Congress's existing authority to regulate liquor under the Commerce Clause was not affected. *See* 76 Cong. Rec. 4219 (1933) (Sen. Fletcher) ("I recognize, of course, that the Congress has power to regulate interstate commerce and to prohibit the movement of wet goods into dry States and that sort of thing. That is in the law now;

we do not need to express that in a new amendment to the Constitution."); *id.* at 4225 (Sen. Reed) (Congress "can prevent shipments into dry States; it can do that at present; it does not need any further grant of constitutional power for that."); *id.* at 4144 (Sen. Wagner) (Section 3 not needed "to restore the constitutional balance of power and authority in our Federal system which had been upset by national prohibition"). Thus, there is nothing in the history of the Twenty-first Amendment that suggests that Congress was deprived of its original authority under Article I to enact laws regulating interstate commerce merely because those laws regulate interstate transportation of alcohol.

### B. State Laws That Regulate Deliveries Of Alcohol By Interstate Carriers Can Violate The Dormant Commerce Clause's Proscription Against Local Laws That Unduly Burden The Interstate Movement Of Goods

In addition to being preempted under the FAAAA, Michigan's laws are subject to review under the Constitution's Dormant Commerce Clause. "The negative or dormant implication of the Commerce Clause prohibits state * * * regulation that discriminates against or unduly burdens interstate commerce and thereby 'imped[es] free private trade in the national marketplace.'" *General Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997) (citations omitted).

Therefore, even if the Court were not to reach the FAAAA preemption argument, the judgment below should be affirmed on respondents' Dormant Commerce Clause discrimination argument. As respondents demonstrate, Michigan's laws should be declared unconstitutional because they discriminate on their face between goods

based solely on whether they originate from out-of-state and thus fall within the "virtually *per se* rule of invalidity" embodied in the Clause. *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Moreover, an undue burden argument should not be foreclosed in cases such as these involving state regulation of the delivery of alcohol.

### 1. The Twenty-first Amendment Does Not Authorize Enforcement Of State Laws That Otherwise Violate The Dormant Commerce Clause

Michigan and private petitioner argue that Section 2 of the Twenty-first Amendment automatically immunizes the state laws at issue in these cases from invalidity under the Dormant Commerce Clause, and appear to suggest that no state law enacted with regard to the transportation of alcohol can be invalidated, regardless of its discriminatory character or the burden imposed on interstate commerce.

But this Court has never adopted that view, recognizing that to do so would free States to adopt laws that would unduly burden interstate commerce in a manner that would harm citizens of the several States and the Nation as a whole. Indeed, as we discuss below, the current patchwork of state laws regulating the delivery of alcohol creates such harms.

Michigan and private petitioner all concede that in order for a state law to fall within Section 2 of the Twenty-first Amendment, the law must be an otherwise constitutional law. *See* 03-1116 Pet. Br. 31 ("Michigan does not contend that the 21st Amendment immunizes it from other provisions of the Constitution. This Court's decisions clearly indicate that it does not."); 03-1120 Pet. Br. 25 ("state regulation of beverage alcohol is of course subject * * * to the First Amendment and other provisions of the

Constitution"). Indeed, even state laws dealing with "importation," one of the matters expressly addressed by the text of Section 2, are subject to all of the Constitution's existing constraints. *See* 03-1116 Pet. Br. 26-27, 31-32 (citing with approval *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964) (state taxation of liquor subject to Constitution's Export-Import Clause)); 03-1120 Pet. Br. 29 (same).

As this Court has held, there is nothing in the text of Section 2 of the Twenty-first Amendment that exempts state laws from Dormant Commerce Clause scrutiny. *See Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984); *Healy v. Beer Inst.*, 491 U.S. 324, 341-342 (1989); *id.* at 344 (Scalia, J., concurring in part and concurring in judgment). Thus, under current precedent, state laws forbidding carriers from delivering alcohol and regulating the manner of delivery are subject to invalidation under the Dormant Commerce Clause. As respondents demonstrate, the Court should not retreat from these holdings, which are a proper interpretation of the Twenty-first Amendment and are entitled to respect as a matter of *stare decisis*.[11]

[11] Petitioners suggests that the Webb-Kenyon Act, 27 U.S.C. § 122, reflects Congress's intent to allow state laws that would otherwise violate the Dormant Commerce Clause. 03-1116 Pet. Br. 36-38; 03-1120 Pet. Br. 16-17. But there is nothing in that Act, just as there is nothing in the Twenty-first Amendment itself, that indicates that Congress intended to authorize discriminatory laws or laws placing undue burdens on instrumentalities of interstate commerce when the burdens outweigh any purported local interest. Indeed, in light of the FAAAA and 27 U.S.C. § 124, the Webb-Kenyon Act simply cannot be understood to sanction all state laws regulating transportation of alcohol.

### 2. State Laws Regulating Deliveries Of Alcohol Impede The Development And Functioning Of A National Market, And May Place An Undue Burden On Interstate Movement Of Goods

The parties in these cases have focused on the state laws' facial discrimination in their treatment of in-state and out-of-state sellers. As respondents explain, the laws at issue in these cases violate fundamental tenets of the Dormant Commerce Clause by discriminating against interstate commerce in favor of local industry and intrastate transportation.

Even if this Court were to reject respondents' claims of unconstitutional discriminatory treatment, however, serious questions would remain open for future litigation concerning the constitutionality of the burden that these laws, viewed in the aggregate, impose on interstate carriers under the Dormant Commerce Clause. The validity of the Michigan provisions regulating carriers was not litigated on this theory and thus there are not facts in the record to establish the full extent of the burden on interstate commerce. Yet there are strong indications that enforcement of these laws against carriers may be contrary to the constitutional principle against economic balkanization reflected in the Commerce Clause. *See Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979).

a. More than a century ago, this Court held that the Commerce Clause by its own force proscribes state regulation of the "transportation of passengers or merchandise through a State, or from one State to another" when there is a threat that "commercial intercourse between States remote from each other may be destroyed." *Case of State Freight Tax*, 82 U.S. (15 Wall.) 232, 279-280 (1873); *see also Louisville & Nashville R.R. v. F.W. Cook Brewing Co.*,

223 U.S. 70, 82-83 (1912) ("it is not competent for any State to forbid any common carrier to transport" any commodity that is the "legitimate subject of interstate commerce" because such regulation would be "an unlawful regulation of interstate commerce not authorized by the police power of the State").

Direct regulation by States regarding the transportation of alcohol creates precisely the kind of "oppressive" burden on interstate carriers that led this Court in *Wabash, St. Louis and Pacific Railway Co. v. Illinois*, 118 U.S. 557 (1886), to hold that the Dormant Commerce Clause proscribed state regulation of the intrastate conduct of interstate carriers. The Court reasoned that, "if each one of the states through whose territories these goods are transported can fix its own rules for prices, for modes of transit, for times and modes of delivery, and all the other incidents of transportation to which the word 'regulation' can be applied, it is readily seen that the embarrassments upon interstate transportation, as an element of interstate commerce, might be too oppressive to be submitted to." *Id.* at 572.

The Court has reaffirmed, time and again, that early understanding of the practical effect of diverse local regulation on interstate commerce in cases involving transportation of persons and property by interstate carriers. *See, e.g., Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945).

The factual conclusion in those cases that many state laws regulating carriers unduly interfered with interstate commerce received the express endorsement of Congress in the enactment of the FAAAA. As noted above, Congress found, similar to this Court's determinations in *Wabash*

and its progeny, that diverse state regulation of carriers "impose[s] an unreasonable burden on interstate commerce * * * [and] impede[s] the free flow of trade, traffic, and transportation of interstate commerce." Pub. L. No. 103-305, tit. VI, § 601(a)(1), 108 Stat. at 1605.

b. Many States regulate not just sellers and buyers of alcohol, but also *carriers*, making it unlawful (and criminal) for carriers to deliver alcohol to certain recipients or otherwise make deliveries that do not conform to state law. For example, many States, including Michigan and New York, forbid carriers from making certain deliveries of alcohol either to unauthorized recipients or from unlicensed shippers. The specific regulations vary, however, from State to State. *See, e.g.*, Alaska Stat. § 04.11.499 (forbidding any person from transporting alcoholic beverages into certain communities); Colo. Rev. Stat. § 12-47-901(l) (permitting deliveries only if the shipper is licensed in Colorado); Fla. Stat. ch. 561.545(2) (making it unlawful to knowingly and intentionally transport any alcoholic beverage from out-of-state to anyone other than a licensed recipient, registered exporter, or state-bonded warehouse); Me. Rev. Stat. Ann. tit. 28, § 2077-B (forbidding the delivery of liquor from an out-of-state company by mail order); Mich. Comp. Laws § 436.1203(1) (forbidding the delivery of alcoholic liquor unless it is made by the State or State licensees); Miss. Code Ann. § 27-71-315 (forbidding deliveries of beer and light wines to anyone other than licensed wholesalers and distributors); N.H. Rev. Stat. Ann. § 178:27(II) (forbidding carriers from shipping into certain areas of the State); N.Y. Alco. Bev. Cont. § 102(d) (permitting deliveries only to consignees who are licensed); Tenn. Code Ann. § 57-3-402(b) (forbidding the delivery of alcohol unless it is to a licensed manufacturer, wholesaler, or certain other authorized recipients).

Such laws can impede the flow of interstate commerce because they disrupt carriers' operations, increase costs, and slow service. As a result, carriers cannot employ uniform procedures for handling and transporting property nationwide. The resulting inefficiencies and delays caused by such state laws may constitute an undue burden on interstate commerce in violation of the Commerce Clause that could not be sustained unless supported by important state interests that justify the burden. *See Raymond Motor Transp.*, 434 U.S. at 440-441 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

The Dormant Commerce Clause serves a fundamental purpose in making the United States the world's largest single economic market, a market in which interstate carriers of property play a critical role. This Court should not adopt a rule that any state law relating to alcohol, regardless of its discriminatory character or direct burden on interstate carriers, would be completely immune from any judicial scrutiny under the Dormant Commerce Clause. Nothing in the Twenty-first Amendment requires this Court to sanction unlimited balkanization of that national market when the product being carried is alcohol.

## CONCLUSION

For the reasons set forth above and in the respondents' brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

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JENNIFER M. GRANHOLM, GOVERNOR, *et al.*,
*Petitioners,*

v.

ELEANOR HEALD, *et al.*,
*Respondents.*

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MICHIGAN BEER & WINE
WHOLESALERS ASSOCIATION,
*Petitioner,*

v.

ELEANOR HEALD, *et al.*,
*Respondents.*

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**On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## BRIEF OF *AMICUS CURIAE* DKT LIBERTY PROJECT IN SUPPORT OF RESPONDENTS

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## INTEREST OF *AMICUS CURIAE*[1]

Thomas Jefferson warned, "the natural progress of things is for liberty to yield and government to gain ground." Mindful of this trend, the DKT Liberty Project was founded to promote civil liberties – including economic liberties – against encroachment by all levels of government. This not-for-profit organization advocates vigilance over regulation of all kinds, especially restrictions of civil and economic liberties that threaten the reservation of power to the citizenry that underlies our constitutional system.

The protectionist and discriminatory state laws at issue in this case implicate fundamental constitutional guarantees against government overreaching. The Liberty Project submits this brief to provide a full discussion of the historical context and original understanding of Section 2 of the 21st Amendment, which demonstrates that the Amendment did not give states the unprecedented power to discriminate against the citizens and products of other states.

## SUMMARY OF ARGUMENT

Section 2 of the 21st Amendment provides:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

U.S. Const., amend. XXI, § 2. As its language indicates, Section 2 gives constitutional sanction and effect to state laws regulating transportation or importation of alcohol by prohibiting the violation of those state laws. Petitioners and their supporting state *amici* concede, however, that Section 2

---

[1] This brief is filed with the consent of the parties, as indicated by letters filed with the Court. No party authored this brief in whole or in part and no one, other than *amicus curiae* or its counsel, monetarily contributed to the preparation or submission of this brief.

does *not* give effect to *all* such state laws, regardless of the constitutional validity they would otherwise have. Mich. Pet. Br. 31; Mich. Wholesalers Ass'n Pet. Br. 14; Ohio Amicus Br. 9. For example, Section 2 does not allow states to discriminate on the basis of race or gender by banning importation by black but not white persons, or by men but not women. Petitioners nonetheless claim that Section 2 does allow overt protectionist discrimination in favor of in-state products and against out-of-state products.

Whatever merit Petitioners' argument might have, it cannot rely on the *text* of Section 2, which in no way distinguishes between the validity of state laws that discriminate on the basis of state origin and those that discriminate on the basis of race or gender or violate other constitutional proscriptions. In truth, Petitioners' position is based not on the Amendment's text, but on a historical premise: that Section 2 was intended to override the Commerce Clause, but not other constitutional provisions.

The legal history is clear, however, that Section 2 was intended to override the then-prevalent understanding of the Commerce Clause only insofar as the Section allows states to regulate importation and transportation of alcohol through *evenhānded* police laws. Section 2 does not trump the virtually *per se* Commerce Clause rule that prevents states from *discriminating* against out-of-state products or against interstate commerce generally.

The text of Section 2 was based directly on the language of the pre-Prohibition Webb-Kenyon Act. Indeed, Petitioners concede that the purpose of Section 2 was to write the rule of Webb-Kenyon into the Constitution. *See infra* at 22. But when the 21st Amendment was ratified, it was well-established that the Webb-Kenyon Act and its precursor, the Wilson Act, allowed enforcement only of evenhanded state police laws regulating or prohibiting alcohol, not

discriminatory or protectionist laws. Section 2 enshrined that rule in the Constitution, but did not give the states new and unprecedented powers to discriminate.

In the 19th century, prior to passage of the Wilson and Webb-Kenyon Acts, this Court held that states had plenary authority under their police powers to regulate alcohol use and distribution, but that state laws enacted pursuant to that plenary police power nonetheless could not – without congressional authorization – reach interstate commerce in alcohol, because the Commerce Clause committed regulation of interstate commerce exclusively to Congress. In addition, the Court broadly construed interstate commerce to encompass not only the transportation and importation of alcoholic beverages (or other articles of commerce), but also their resale in the "original package." Thus, even when a state passed a comprehensive, nondiscriminatory prohibition law banning all alcohol sales, a merchant was still free to set up shop to import alcohol from out of state and resell it in state in its original package. Interstate commerce and out-of-state products were thereby *favored* over domestic commerce and products, because the former were *absolutely* beyond state regulation, even under evenhanded police laws. That rendered state-level prohibition meaningless as a practical matter.

The Wilson Act was Congress's first attempt to remedy this situation by leveling the playing field and allowing states to regulate imported alcohol on the same terms as the domestic product. The Wilson Act allowed states to enforce their police laws against imported alcohol once it was received by the in-state consignee. Hence, resale of the imported product in state, even when still in the original package, became subject to state regulation. The Wilson Act's constitutionality was hotly contested, however, on the ground that the Act represented an unconstitutional

delegation to the states of Congress's exclusive commerce power. Rejecting that argument, this Court reaffirmed the established principle that Congress could not delegate its commerce power, but held that the Wilson Act was not such a delegation insofar as it permitted states to enforce their evenhanded police laws to imported alcohol. The Court reasoned that the Wilson Act did not delegate Congress's commerce power, but instead merely took the interstate-commerce immunity to state regulation away from imported alcohol, thereby allowing the states' preexisting police powers to reach those imports.

Although subtle, the distinction drawn by the Court between an impermissible delegation of the commerce power and a permissible elimination of immunity from state police laws had enormous practical significance: it meant that states could subject imports only to traditional police regulation, which does *not* include the power to *discriminate* against out-of-state products. Thus, in the landmark case of *Scott v. Donald*, 165 U.S. 58 (1897), the Court held that the Wilson Act does not allow a state to enforce a law that discriminates against imports in favor of in-state products, precisely because protectionist and discriminatory state laws are not encompassed within the states' police power. The Court unanimously reiterated that holding in *Vance v. W.A. Vandercook Co.*, 170 U.S. 438 (1898), explaining that discrimination against out-of-state products is "not a police law, in the correct sense of those words," *id.* at 450; *see also id.* at 462 (Shiras, J., dissenting) (agreeing that discrimination by state is not a "bona fide exercise of its police power").

The Webb-Kenyon Act extended the Wilson Act to cover not only the resale of imported alcohol in the original package, but also the acts of transporting and importing such alcohol into the state in the first instance. But the Webb-Kenyon Act did not – and could not – alter the rule of *Scott*

and *Vance* that removal of the interstate commerce immunity from alcohol imports still allowed enforcement only of evenhanded state laws, because discriminatory regulations are not bona fide police laws. Indeed, this Court expressly held that the power exercised by Congress in the Webb-Kenyon Act was identical to that behind the Wilson Act, the only difference being that Webb-Kenyon allows evenhanded state regulation at an earlier point in the course of importation. The legislative history of Webb-Kenyon confirms that construction and is replete with explanations that the purpose of the law was to subject imports to the *same* police regulations that apply tc domestic alcohol. And, adhering to this Court's rulings in *Scott* and *Vance*, the South Carolina Supreme Court held that the Webb-Kenyon Act, like the Wilson Act, does not permit enforcement of state laws that discriminate against out-of-state products. In contrast, we are unaware of *any* case upholding a discriminatory state law under either the Wilson or the Webb-Kenyon Act.

The 18th Amendment destroyed the balance struck by Webb-Kenyon by both nationalizing and constitutionalizing a subject that had been left to state police regulation. When that experiment failed, the purpose of the 21st Amendment was not simply to end Prohibition, but to restore the prior balance of authority established by the Webb-Kenyon Act. But the framers of the 21st Amendment understood that a future Congress could repeal a statute such as Webb-Kenyon, and dissenting opinions from this Court precluded certainty about the statute's constitutionality. If Webb-Kenyon were repealed or struck down in the future, imported alcohol would again become immune from *all* state police regulations, and dry states could no longer be dry. To prevent that from occurring, the text of the Webb-Kenyon Act, edited to remove excess verbiage, was included in the 21st Amendment as Section 2.

That constitutionalization of the rule did not alter its scope in any way, and certainly did not authorize unprecedented discrimination against out-of-state products. When the 21st Amendment was ratified, the rule was well established that states could not pass or enforce laws discriminating against imported alcohol, even after the imports lost their interstate-commerce immunity to state regulation. State laws that discriminate against goods imported from other states are *per se* invalid, and always have been. Section 2 did not change that rule, but simply gave constitutional assurance that otherwise valid state laws could reach imports on the same terms as domestic products.

## ARGUMENT

### The History of the 21st Amendment Demonstrates That Section 2 Permits States to Regulate Imported Alcohol Pursuant to Evenhanded Laws, Not to Discriminate Against Out-of-State Products.

#### A. Before Section 2, the Commerce Clause Barred States from *All* Regulation of Alcohol Importation or Resale in the Original Package, Gutting State Prohibition Laws.

The 21st Amendment was adopted in 1933, before the fundamental changes in Commerce Clause doctrine that began during the New Deal. At that time, a century of decisions from this Court, stretching back to *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), treated the spheres of state and federal regulation as absolutely separate and mutually exclusive. The states but not the federal government could regulate their own domestic affairs under the police power, whereas the federal government but not the states could regulate interstate commerce. While the borderline between these spheres was sometimes obscure,

once established it could not be crossed. As the Court explained in 1891:

> [I]t is not to be doubted that the power to make the ordinary regulations of police remains with the individual states, and cannot be assumed by the national government . . . . The power of congress to regulate commerce among the several states, when the subjects of that power are national in their nature, is also exclusive.

*Wilkerson v. Rahrer*, 140 U.S. 545, 555 (1891). In the absence of congressional regulation, interstate commerce was deemed to be free and unregulated by the states as well:

> The constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free except as congress might impose restraint. Therefore it has been determined that the failure of congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several states.

*Id.*

Accordingly, once a subject was determined to be "interstate commerce," it was wholly outside the reach of state regulation, absent congressional action. Interstate commerce was, moreover, expansively defined to include not only the interstate sale and shipment of goods, but also the resale of imports within a state so long as they remained in their "original package." *See, e.g., Leisy v. Hardin*, 135 U.S. 100, 110-11, 122 (1890); *Vance*, 170 U.S. at 444-45.

As a result, the Commerce Clause barred state regulation of commerce in alcoholic beverages in at least three distinct ways:

> (a) Beyond dispute, the respective states have plenary power to regulate the sale of intoxicating liquors within their borders, . . . *provided . . . that the regulations do not operate a discrimination* against the rights of residents or citizens of other states of the Union.
>
> (b) Equally well established is the proposition that the *right to send liquors from one state into another, and the act of sending the same*, is interstate commerce, the regulation whereof has been committed by the constitution of the United States to congress, and hence that a state law which denies such a right . . . is in conflict with the constitution of the United States.
>
> (c) It is also certain that the settled doctrine is that the power to ship merchandise from one state into another carries with it, as an incident, *the right in the receiver of the goods to sell them in the original packages*, any state regulation to the contrary notwithstanding . . . .

*Vance*, 170 U.S. at 444-45 (emphasis added).

Thus, the requirement that states regulate evenhandedly and not "discriminat[e] against the rights of residents or citizens of other states" was then, as it is now, an absolute limitation on the states' plenary or police powers (paragraph (a) above). *See also, e.g., Walling v. Michigan*, 116 U.S. 446, 460 (1886) (observing that the "police power . . . would be a perfect justification" of a tax on alcohol "if it did not discriminate against the citizens and products of other states"); *McDermott v. Wisconsin*, 228 U.S. 115, 132 (1913)

("it is . . . well settled that the state may not, under the guise of exercising its police power or otherwise, . . . discriminate against interstate commerce").

In addition, however, the Commerce Clause also gave *favored* treatment to interstate transactions by absolutely immunizing them from the very same state laws that applied to wholly domestic matters. And that immunity from state regulation extended not only to sales and importation across state lines (paragraph (b) above), but also to subsequent sales of imports within the state itself, so long as the imported products remained in their original packages (paragraph (c)).

*Leisy v. Hardin*, 135 U.S. 100 (1890), exemplifies how that then-established understanding of the Commerce Clause effectively nullified state prohibition laws. At issue in *Leisy* was an Iowa law that absolutely prohibited all sales of alcoholic beverages, whether domestic or imported. *Id.* at 124.[2] The Court nonetheless held that the Iowa law could not, without congressional authorization, be enforced against non-residents who imported alcohol from neighboring states and resold it in Iowa in its original packages. *Id.* at 124-25. As the facts in *Leisy* itself vividly attest, that immunity from state regulation allowed importers to set up shops in the nominally dry state for the sale of imported alcohol in its original package, rendering the state's prohibition law a dead letter.

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[2] The Iowa law – like most of the other state regulations discussed in this brief – contained exceptions for non-beverage alcohol sold for sacramental, chemical, or medicinal purposes. In the case of sales for medicinal purposes, the exception applied only to licensed pharmacists who were Iowa citizens. 135 U.S. at 124. However, that discriminatory element of the law was not at issue in *Leisy*, because the out-of-state plaintiffs sought to sell imported alcohol as a beverage, not for medicinal purposes, and the Iowa law absolutely banned the sale of beverage alcohol by citizens and non-citizens alike.

### B. The Wilson Act Took Away the Immunity of Original Package Sales from State Police Regulation, But Did Not and Could Not Give States a New Power to Discriminate Against Imported Alcohol.

Five months after *Leisy* was decided, Congress reacted by passing the Wilson Act, which provides:

> That all . . . intoxicating liquors . . . transported into any State or Territory . . . shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such . . . liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

26 Stat. 313, ch. 728 (1890), *codified at* 27 U.S.C. § 121.

The Wilson Act was subject to almost immediate attack as an unconstitutional delegation of congressional power. *See Wilkerson v. Rahrer*, 140 U.S. 545 (1891). The day after the Act's passage, a non-resident was arrested for selling imported alcohol in its original package in Kansas, in violation of that state's general prohibition law, which "applied to the sale of all intoxicating liquors whether imported or not." *Id.* at 564. The Court in *Rahrer* began with and reaffirmed the well-established premise "that congress can neither delegate its own powers, nor enlarge those of a state." *Id.* at 560. The Court nonetheless upheld the Wilson Act's constitutionality on the ground that "congress ha[d] not attempted to delegate the power to regulate commerce, or to exercise any power reserved to the states, or to grant a power not possessed by the states, or to adopt state laws." *Id.* at 561. Instead, the Court found,

Congress had removed a barrier to the enforcement of otherwise valid and nondiscriminatory "laws of the state . . . passed in the exercise of its police powers, and applied to the sale of all intoxicating liquors whether imported or not." *Id.* at 564. The Wilson Act simply "provide[s] that certain designated subjects of interstate commerce shall be governed by a rule which divests them as of that character at an earlier period of time than would otherwise be the case." *Id.* at 562. Thus:

> Congress did not use terms of permission to the state to act, but simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition . . . .

*Id.* at 564. By divesting imported alcohol of its character as interstate commerce, Congress eliminated its immunity from state regulation, thereby allowing the same police laws that applied to domestic alcohol to take effect.

In *Scott v. Donald*, 165 U.S. 58 (1897), the Court made explicit what was implicit in the rationale of *Rahrer*: the Wilson Act did not permit states to enforce protectionist laws that discriminated against imported alcohol in favor of domestic products. The Court explained:

> The question whether a given state law is a lawful exercise of the police power is still open, and must remain open, to this court. Such a law may forbid entirely the manufacture and sale of intoxicating liquors, and be valid; or it may provide equal regulations for the inspection and sale of all domestic and imported liquors, and be valid. But the state cannot, under the [Wilson Act], establish a system which, in effect, discriminates between interstate and domestic commerce . . . .

*Id.* at 100. Under the Wilson Act, "equality or uniformity of treatment under state laws was intended," so that the Act "was not intended to confer upon any state the power to discriminate injuriously against the products of any other state." *Id.* Thus,

> when a state recognizes the manufacture, sale, and use of intoxicating liquors as lawful, it cannot discriminate against the bringing of such articles in, and importing them from other states; . . . such legislation is void as . . . an unjust preference of the products of the enacting state as against similar products of the other states.

*Id.* at 101. Applying this construction of the Act, the Court struck down the South Carolina law at issue in *Scott*, because the law discriminated against sales of imported alcohol in the original package in favor of domestic alcohol. *Id.* at 99.

The Court unanimously reaffirmed *Scott*'s holding the next year in *Vance v. W.A. Vandercook Co.*, 170 U.S. 438 (1898). As the majority opinion explained:

> [A]lthough the [Wilson Act] authorizes a state law to attach to an original package so as to prevent its sale, it did not contemplate and sanction the operation of a state law which injuriously discriminated against the products of other states, and which *in consequence of such discrimination, was not a police law, in the correct sense of those words*.

*Id.* at 449-50 (emphasis added). In complete agreement on this point, the dissent in *Vance* likewise explained that a state alcohol regulation is not "a bona fide exercise of [a state's] police power," and thus is not effective under the Wilson Act, unless it applies "with equal effect as to such liquor whether imported or of domestic manufacture." *Id.* at 462 (Shiras, J., dissenting). The majority and dissent disagreed

about the application of this antidiscrimination principle in the particular case before the Court, with the majority upholding the South Carolina law as it applied to original package sales on the ground that it had been amended since *Scott* to eliminate discrimination against imports. *See id.* at 443 (finding that statute "does not contain those clauses in the previous statute which were held to operate as a discrimination"). Despite this disagreement concerning application, not a single Justice disputed that a law that discriminates is not a valid exercise of the state's police power, and thus could not be enforced under the Wilson Act.

On the same day it decided *Vance*, a sharply divided Court also gave the Wilson Act a narrowing construction in *Rhodes v. Iowa*, 170 U.S. 412 (1898). *Rhodes* held that imported alcohol did not "arrive" in a state for purposes of the Wilson Act until it had been received by the in-state consignee, which meant that even a nondiscriminatory police law could not be applied during the importation and transportation of alcohol until delivery to the consignee. *Id.* at 426. The Court reasoned that importation and interstate transportation are core aspects of interstate commerce, whereas resale of imports in the original package is merely an incident of such commerce. *Id.* at 424. The Court therefore required a clear statement from Congress before the immunity of interstate commerce would be removed from transportation and importation as well as from resale in the original package. *Id.* (requiring "the clearest implication"); *see also id.* at 423 (observing that had that been Congress's intent, "such purpose would have been easy of expression"). Accordingly, the Court held that Iowa's evenhanded law concerning transportation of alcohol within the state could not be applied to a imported shipment until transportation was completed by delivery to the in-state consignee. *Id.* at 426; *see also id.* at 418-19 (observing that Iowa law applied

both to transportation originating within and outside the state).[3]

### C. The Webb-Kenyon Act Extended the Wilson Act So That Evenhanded State Regulation Could Reach Importation and Interstate Transportation of Alcohol, But the Act Did Not Create a New Power to Discriminate Against Imports.

The clear statement demanded by the Court in *Rhodes* was supplied by Congress in 1913 though the Webb-Kenyon Act, which provides:

> That the shipment or transportation ... of any ... intoxicating liquor of any kind, from one State, Territory, or District of the United States ... into any other State, Territory, or District ... which ... intoxicating liquor is intended ... to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District ... is hereby prohibited.

37 Stat. 699-700, ch. 90 (1913), *codified at* 27 U.S.C. § 122.

Read in historical context, the plain effect of the Webb-Kenyon Act is to extend the rule of the Wilson Act so that state police laws could reach importation and transportation

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[3] *See also Vance*, 170 U.S. at 451-57 (upholding evenhanded state law as it applied to resale of imported alcohol in original package, but following *Rhodes* in holding that another evenhanded provision could not be enforced against interstate shipper); *Adam Express Co. v. Kentucky*, 214 U.S. 218 (1909) (following *Rhodes* in holding that evenhanded law barring knowing transportation of alcohol to inebriate could not be enforced against interstate shipper); *Louisville & Nashville R.R. Co. v. F.W. Cook Brewing Co.*, 223 U.S. 70 (1912) (following *Rhodes* and holding that evenhanded law barring transportation of alcohol to consignee in dry county could not be enforced against interstate shipper).

of alcohol *before* delivery to the in-state consignee. Equally clear, the Webb-Kenyon Act, like the Wilson Act, only gives effect to evenhanded state laws, not laws that discriminate against interstate commerce. When Webb-Kenyon was enacted, it was well established that Congress could not delegate its commerce power, but could only "remove[] an impediment to the enforcement of . . . state laws" "passed in the exercise of [the state's] police powers." *Rahrer*, 140 U.S. at 564. That Congress intended to do just that through Webb-Kenyon is confirmed by its title: "An Act Divesting Intoxicating Liquors of Their Interstate Character in Certain Cases." 37 Stat. 699. But divesting imports of their interstate character could not have empowered states to enforce protectionist laws discriminating against imports, because it had long been established that discriminatory laws are not proper or bona fide police laws in the first place. *Supra* at 8, 11-13. Thus, by prohibiting "shipment or transportation . . . in violation of any law of such state," the Webb-Kenyon Act plainly means any *valid* police law, not an invalid discriminatory one. In 1913, no one reading the Act's language against the background of this Court's decisions would have understood its text in any other way.

That contemporaneous understanding of the words of Webb-Kenyon is confirmed by the legislative debates concerning it. Senator Kenyon introduced the bill with a lengthy account of this Court's decisions on the subject, 49 Cong. Rec. 765-69 (1912), and emphasized that under those decisions "an article may be taken out of commerce by Congress" and "that by such legislation Congress does not delegate the power to regulate commerce . . . , or . . . enlarge the police power of the States, or grant a power not possessed by them." *Id.* at 767.

Consistent with that understanding, other supporters of the bill repeatedly characterized it as subjecting imports to

the very same police laws that apply to domestic alcohol. As Senator Thornton explained:

> This bill permits the States to exercise the same police power over liquor shipped into its territory from another State that it could exercise over it if the shipment originated within its territory . . . .

49 Cong. Rec. 2912 (1913). Senator Webb likewise stated:

> We simply ask for equal justice. . . . We simply ask you "to deprive liquors intended for unlawful purposes of interstate commerce character, and let us deal with such imported liquors as we would with liquors of domestic production intended for the same unlawful purposes."

*Id.* at 2912-13. Senator Stone made exactly the same point:

> The pending bill . . . would in effect merely strip these particular commodities of their character as articles of interstate commerce, and thus withdraw from them the protection the Federal law now throws over them against the law and police regulations of the State. It would merely put the shipper outside of Missouri or Iowa or Arkansas upon a level, that is upon terms of equality, so far as State law and regulation go, with the shipper within the State.

*Id.* at 2917.

Equally telling are the arguments put forward by the opponents of the bill. They contended at great length and with great vehemence that regardless of the labels used, the bill sought to effect an unconstitutional delegation to the states of Congress's power to regulate interstate commerce. They maintained that interstate transportation – unlike the original-package sales covered by the Wilson Act – is a core aspect of interstate commerce within the meaning of the

Constitution, and that Congress was powerless to alter the constitutional division of powers simply by declaring that core interstate commerce is something else. *E.g.*, *id.* at 2909-11 (Sen. Sutherland); *id.* at 2899-2903 (Sen. Pomerene). Yet, except for a single passing reference, the opponents never suggested that the bill was unconstitutional for the additional and far more compelling reason that it purported to authorize protectionist laws discriminating against out-of-state products.[4] Given this Court's established doctrine that discrimination against imports is inherently invalid and not a proper object of state police laws, surely the bill's erudite critics would have placed very heavy emphasis on that additional constitutional infirmity if such a reading had even been imaginable. If ever there was a case of "the dog that did not bark," this is it. *E.g.*, *Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991).[5]

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[4] The passing reference to the possibility of discrimination was made by Senator Root in the course of arguing that the bill was "not giving up the regulation and allowing police law to take its place. It is handing over the power of regulation to the State . . . ." *Id.* at 2915. That merely drives home the point, however, that Congress could not have authorized the states to discriminate against imports except by delegation of Congress's own power to regulate interstate commerce, something that all agreed this Court's precedents forbade.

[5] Nor is there merit to the Wholesaler Petitioners' contention that the Webb-Kenyon Act authorizes discrimination by negative implication because the law as enacted includes only the first and not the second section of the original proposed Senate bill, which Petitioners claim would have expressly outlawed discrimination. Mich. Wholesalers Ass'n Pet. Br. 24. The record is clear that, with respect to the first and section sections of the original bill, the Senators saw the "purpose sought to be accomplished by each of these sections [as] *precisely the same*, namely, to allow the State jurisdiction over intoxicating liquors to attach upon the instant that such liquors . . . cross the boundary lines of the State," but that "section 2 does directly what section 1 does indirectly." 49 Cong. Rec. at 2903-04 (Sen. Sutherland) (emphasis added). The proposed second section was therefore seen by friends and foes alike as being *more*

Subsequent judicial decisions confirm that the Webb-Kenyon Act merely extended the Wilson Act so that state jurisdiction attaches at an earlier stage when imports crossed the border, without giving states an unprecedented and constitutionally dubious power to discriminate against imports. In *James Clark Distilling Co. v. Western Maryland Railway Co.*, 242 U.S. 311 (1917), a divided Court upheld the constitutionality of Webb-Kenyon as it applied to a nondiscriminatory West Virginia prohibition law that "forbade the shipment into or transportation of liquor in the state, whether from inside or out." *Id.* at 321; *see also id.* at 318 (state law barred "all shipments . . . whether from within

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*vulnerable* than the first section to constitutional attack as a *direct* delegation of power to the states. *E.g.*, *id.* at 830 (Sen. Kenyon) ("The first section takes certain liquor out of commerce and the second section seems to recognize it as being in," thereby creating objection that second section would be direct delegation to states of power over interstate commerce rather than removal of immunity); *id.* at 2914 (Sen. Root) (stating with respect to second section that "the friends of the bill have practically conceded that it is not constitutional"); *id.* at 2919 (Sen. Borah) (stating that he could not vote for second section "entertaining the view which I do as to its unconstitutionality" but that "in regard to the first section . . . I think . . . it is not subject to the inhibition of the Constitution"). Plainly, the Senators' unanimous evaluation of the two sections' comparative constitutional vulnerabilities would have been exactly the opposite – the first section would have been more objectionable than the second – if they had entertained any notion that the former actually allowed discrimination while the latter did not. There is not one hint of that in the legislative debates. Ultimately, the sponsors of the Senate bill moved to strike the second section simply because it had not been part of the bill already passed by the House, "in the hope [that the bill] will more likely become a law than if we send the Senate bill to the House as a separate and independent measure, couched in different language from that which is employed in the House bill." *Id.* at 2918 (Sen. Gallinger). In short, the deletion of section 2 from the original Senate bill cannot in any way support the negative inference that the remaining section that was passed into law was somehow intended to authorize discrimination.

or without the state"). The Court observed that though the Wilson Act allowed states to regulate sales in the original package *after* receipt in state, "the right to receive liquor was not affected by the Wilson Act" and so had remained beyond the reach of state police laws. *Id.* at 323. Given this history, the Court construed Webb-Kenyon as simply extending the Wilson Act's rule to imports prior to receipt, as well as after:

> Reading the Webb-Kenyon Law in the light . . . thrown upon it by the Wilson Act and the decisions of this court which sustained and applied it, there is no room for doubt that it was enacted simply to extend that which was done by the Wilson Act; that is to say, its purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in states contrary to their laws . . . .

*Id.* at 323-24.

Hence, as the Webb-Kenyon Act simply "took the protection of interstate commerce away from all receipt and possession of liquor prohibited by state law," *id.* at 325, "[t]he argument as to delegation to the states rests upon a mere misconception." *Id.* at 326. The Court therefore concluded:

> As the power to regulate which was manifested in the Wilson Act, and that which was exerted in enacting the Webb-Kenyon Law, are essentially identical, the one being but a larger degree of exertion of the identical power which was brought to play in the other, we are unable to understand upon what principle we could hold that the one was not a [constitutional] regulation without holding that the other had the same infirmity . . . .

*Id.* at 330.

Although *James Clark* did not directly present or address the question of discrimination against imports, its rationale makes clear that discrimination is no more permissible under the Webb-Kenyon Act than under the Wilson Act. The later law was but the extension of the earlier, enacted pursuant to the identical power, so that it applied to imports from the moment they crossed the border. Neither statute was an unconstitutional delegation of the commerce power, because both merely removed an immunity from otherwise lawful state police regulation. In short, under the Webb-Kenyon Act as under the Wilson Act, "evidently equality or uniformity of treatment under state laws was intended." *Scott*, 165 U.S. at 100.

Exactly that was the conclusion reached in the only case we have found that directly addressed the enforceability of a discriminatory state law under the Webb-Kenyon Act. *See Brennan v. Southern Express Co.*, 90 S.E. 402 (S.C. 1916). That case concerned South Carolina's alcohol regulations, which had also been at issue in both *Scott* and *Vance*. *Brennan* addressed the validity of the state's laws at two different times: an earlier period in which the state overtly discriminated against imports in favor of domestic sales, and a later period in which that discrimination had been replaced by evenhanded regulation. *Id.* at 403-04. Anticipating this Court's decision a few months later in *James Clark*, the South Carolina court upheld the enforceability of the later, *evenhanded* state law under Webb-Kenyon. Specifically, the court rejected the argument that under Webb-Kenyon a state law could not forbid importation unless it also prohibited use, explaining:

> If absolute prohibition does not offend the Constitution, by what power of reasoning can it be asserted that the lesser exertion of power in a measure of restriction and regulation does, *provided, of*

> *course, it be equal and uniform in application and operation.*

*Id.* at 406 (emphasis added); *accord James Clark*, 242 U.S. at 324-25 (reaching same conclusion).

The validity of the state law when it discriminated against imports was quite another matter. The South Carolina court reasoned that the question had been squarely decided in *Scott*, and that the subsequent enactment of the Webb-Kenyon Act did not change the result. 90 S.E. at 403-04.

> [F]or, while that act does divest intoxicating liquors . . . of their interstate character and withdraw from them the protection of interstate commerce, it evidently contemplated the violation of only *valid* state laws. It was not intended to confer and did not confer upon any state the power to make injurious discriminations against the products of other states . . . .

*Id.* at 404 (emphasis added) (observing also that "the same thing was said in Scott v. Donald of the Wilson Act . . . , by which Congress made liquors shipped into a state subject to its laws after delivery thereof to the consignee. The principle there decided was reaffirmed in *Vance* . . .").

That was where the law stood when the 18th Amendment was ratified in 1919.

### D. After Prohibition, Section 2 Restored and Constitutionalized the States' Power Under Webb-Kenyon to Regulate Imported Alcohol, But Did Not Create a New Power to Discriminate.

The balance struck by the Webb-Kenyon Act was violently disrupted by the 18th Amendment, which nationalized and constitutionalized a matter that had until then been committed to the states: police laws regulating

alcohol. That radical departure from historical practice was a notorious failure. As Senator Wagner explained, arguing for repeal:

> [T]he question which has troubled the American people since the eighteenth amendment was added to the Constitution was not at all concerned with liquor. It was a question of government; how to *restore* the constitutional balance of power and authority in our Federal system which had been upset by national prohibition.

76 Cong. Rec. 4144 (emphasis added).

Accordingly, the repeal of the 18th Amendment did not simply supplant nationwide prohibition with nationwide free-trade in alcohol. Instead, it sought to restore the balance in federal and state power that had prevailed before 1919. That purpose is reflected in the language of Section 2 itself, which is directly based upon the language of the Webb-Kenyon Act.[6] Indeed, as Petitioners concede, Section 2 wrote the Webb-Kenyon Act into the Constitution, thereby permanently restoring the scope of state power as it existed immediately prior to Prohibition. Mich. Wholesalers Ass'n Pet. Br. 16; *see also* Mich. Pet. Br. 38.

The inclusion of Section 2 in the Amendment repealing Prohibition was thought necessary to ensure that the states

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[6] *Compare* U.S. Const. amend. XXI, § 2 ("The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited"), *with* 37 Stat. 699-700 ("That the shipment or transportation . . . of any . . . intoxicating liquor . . . from one State, Territory, or District of the United States . . . into any other State, Territory, or District . . . which . . . intoxicating liquor is intended . . . to be received, possessed, sold, or in any manner used . . . in violation of any law of such State, Territory, or District . . . is hereby prohibited").

would have the power to enforce their local alcohol policies and, in particular, that the dry states could remain dry. As one congressman explained, Section 2 would "aid and protect the so-called dry States in permitting them to exclude, if their citizens so wish, all liquor traffic in their domains." 76 Cong. Rec. 4526 (1933) (Rep. Herney).[7]

To be sure, the states could already exercise that power under the Webb-Kenyon Act. But that statutory measure was deemed to be inadequate assurance for the dry states, for two reasons: it could be repealed by a simple act of Congress, and it could be held unconstitutional by this Court. Senator Borah drove those points home in an eloquent plea for the inclusion of Section 2 in the Amendment. He reminded the Senate that the constitutionality of Webb-Kenyon had been sustained by a divided Court in *James Clark*, and that many eminent jurists – including President (later Chief Justice) Taft, Senator Elihu Root, and Senator (later Justice) Sutherland – had all argued against the law's constitutionality. 76 Cong. Rec. 4170. Moreover, as soon as the Act was sustained in *James Clark*, a campaign had been waged to repeal it in Congress, or to challenge it again in this Court. *Id.* Senator Borah therefore warned that, without Section 2,

> we are turning the dry States over for protection to a law which is still of doubtful constitutionality and

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[7] *See also id.* at 4171 (Sen. Wagner) (stating no objection to Section 2 "if the dry States want additional assurance that they will be protected . . ."); *id.* at 4517 (Rep. McLeod) (describing Section 2 as "the added section of protection for dry States"); *id.* at 4518 (Rep. Robinson) ("Section 2 attempts to protect dry States"); *id.* at 4159 (Rep. Garber) ("[Section 2], it is claimed, will protect the dry States"); *id.* at 4523 (Rep. McSwain) ("[I]f 36 States should act in favor of ratifying this proposed amendment, then, undoubtedly, each and every State in the Union could be just as dry as its own laws make it . . .").

> which, as it was upheld by a divided court, might very well be held unconstitutional upon a representation of it. [In addition,] we are asking the dry States to rely upon the Congress of the United States to maintain indefinitely the Webb-Kenyon law

*Id.*

Senator Borah then turned to describing what would happen if Webb-Kenyon were repealed or struck down. He recalled that after this Court's decision in *Leisy v. Hardin*, "[t]he States . . . were powerless to protect themselves against the importation of liquor into the States" *Id.* at 4171 (adding that "[t]here never was any real chance for the dry States to enforce their laws after the decision which was made in the case of Leisy against Hardin[]"). He then summed up the devastating effects of nullifying "the right of the States, in the exercise of the police powers, to control the liquor traffic within the States," and concluded:

> All this was sought to be remedied by the Webb-Kenyon Act, and I am very glad indeed [other Senators have] seen fit to recognize the justice and fairness to the states of incorporating it permanently in the Constitution of the United States.

*Id.* at 4172.

Exactly the same understanding of Section 2 as incorporating Webb-Kenyon in the Constitution is demonstrated by Senator Blaine's report of the views of the Judiciary Committee in proposing the Section. He began by reviewing the Wilson and Webb-Kenyon Acts, through which "Congress itself regulated interstate commerce to the

point of removing all immunities of liquor in interstate commerce." *Id.* at 4140.[8] But, Senator Blaine observed,

> [i]n the case of Clark against Maryland Railway Co. there was a divided opinion [sustaining the Webb-Kenyon Act]. There has been a divided opinion in respect to the earlier cases, and that division of opinion seems to have come down to a very late day. So, to assure the so-called dry States against the importation of intoxicating liquor into those States, it is proposed to write permanently into the Constitution a prohibition along that line.

*Id.* at 4141.

In short, Section 2 was understood by all as incorporating the Webb-Kenyon Act directly into the Constitution, thereby permanently restoring the states' ability to enforce their police laws against imported and domestic alcohol alike. That is consistent with the very language of Section 2, taken directly from Webb-Kenyon itself. Like Section 1 of the Amendment repealing Prohibition, Section 2 both restored the status quo ante and permanently enshrined it in the Constitution.

That understanding of the language and purpose of Section 2 is also consistent with the Senate's decision to strike the original proposed resolution's Section 3. Section 3 would have given Congress a completely novel police power, concurrent with the states, "to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold." 76 Cong. Rec. 4138. Unlike Section 2, which sought to restore the balance of state and federal powers by

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[8] The quoted words actually came from Senator Wagner, after which Senator Blaine said, "I thank the Senator. I think he has given the correct statement of the doctrine." *Id.*

constitutionalizing the Webb-Kenyon Act, Section 3 would have continued the flaws of Prohibition by giving Congress a power it never had before 1919. As Senator Wagner explained:

> I am in sympathy with that purpose [of preventing the return of the saloon]; but the suggested method of accomplishing it – the proposal that it shall continue to be the responsibility of the Federal Government – is all wrong. It flies in the face of reason and experience. If the Federal Government failed to discharge that responsibility under the all-embracing prohibition of the eighteenth amendment, what folly is it which prompts anyone to believe that it can discharge it under the milder language of the pending resolution?

76 Cong. Rec. 4145.[9]

Senator Blaine similarly criticized Section 3 for upsetting rather than restoring the pre-Prohibition balance. Because his remarks on this point have sometimes been misconstrued as evidence that Section 2 was intended to give states *unlimited* power to regulate alcohol, they are worth quoting at some length:

> I am now endeavoring to give my personal views [criticizing Section 3]. The purpose of section 2 is to restore to the States by constitutional amendment absolute control in effect over interstate commerce

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[9] Similarly, numerous Senators criticized Section 3 because it would have perpetuated another novel aspect of the 18th Amendment: giving state and national governments "concurrent power" rather than maintaining separate spheres. *See* 76 Cong. Rec. 4143 (Sens. Blaine and Wagner); *id.* at 4145-46 (Sens. Walsh and Wagner); *id.* at 4155 (Sens. Walsh and Brookhart); *id.* at 4161-62 (Sens. Brookhart and Norris); *id.* at 4173 (Sens. Borah, Hastings, and Black).

> affecting intoxicating liquors which enter the confines of the States. The State under section 2 may enact certain laws on intoxicating liquors, and section 2 at once gives such laws effect. Thus the States are granted larger power in effect and are given greater protection, while under section 3 the proposal is to take away from the States the power that the States would have in the absence of the eighteenth amendment. My view therefore is that section 3 is inconsistent with section 2 . . . and that section 3 ought to be taken out of the resolution.

*Id.* at 4143.

Senator Blaine's overall point in this passage is that, by giving Congress police powers it never possessed pre-Prohibition, Section 3 is inconsistent with "[t]he purpose of section 2 . . . to *restore* to the States . . . absolute control." *Id.* (emphasis added). In this context, the phrase "absolute control" does not mean a power uncabined by any other constitutional constraints, but rather a power that is absolute in the sense that it is *independent of Congress*, not shared concurrently with Congress. And by "restor[ing]" the states' preexisting power "by constitutional amendment," the states are "granted larger power in effect and are given greater protection," in the sense that this power cannot be repealed by Congress or struck down by the judiciary. *Id.* In short, Senator Blaine's comments simply reflect the consensus that Section 2 simultaneously restored the status quo ante and made it more secure by writing Webb-Kenyon into the Constitution itself. Thus, while his "personal views" critical of Section 3 departed from the Judiciary Committee's, his statements concerning Section 2 were entirely consistent with the Committee's views, reported earlier by Senator Blaine himself, that Section 2 restored the pre-Prohibition balance under the Webb-Kenyon Act by "writ[ing] permanently into

the Constitution a prohibition along that line." *Id.* at 4141 (Sen. Blaine's report of Judiciary Committee views); *see supra* at 25-25 (discussing same).

Although less specifically focused on this issue, the views expressed at the states' ratifying conventions are also consistent with the overall theme that the 21st Amendment would restore the balance between federal and state authority that existed before Prohibition. For example, the President of the Kentucky convention argued that "in thus amending the Constitution we are not tearing down. We are doing a constructive work of restoration . . . ." *Ratification of the Twenty-First Amendment to the Constitution of the United States: State Convention Records and Laws* 169 (Edward Somerville Brown, ed. 2003). Similarly, a delegate at the Pennsylvania convention described the 21st Amendment as an "opportunity to reclaim for the Commonwealth of Pennsylvania the sovereignty . . . which was, I regret to say, abdicated in the early part of 1919." *Id.* at 355-56.

In sum, as the very language of Section 2 tracking the Webb-Kenyon Act makes clear, the Section permanently restored the power of the states under Webb-Kenyon to regulate alcohol imports on equal terms with the domestic product. By eliminating the absolute immunity from state regulation that such imports would otherwise have possessed absent congressional action, Section 2 substantially modified the rule that would otherwise have applied under the Commerce Clause, as it had been repeatedly interpreted by this Court. But this Court's prior cases made equally clear that eliminating the interstate commerce immunity for imported alcohol only allows the states to enforce otherwise valid state laws, such as evenhanded police regulations, and that protectionist or discriminatory state laws are inherently invalid. No one familiar with the legal history of this subject

could read Section 2 as giving states a new power to discriminate against the products of other states.

Accordingly, by prohibiting transportation or importation in violation of state laws, Section 2 "evidently contemplate[s] the violation of only *valid* state laws. It was not intended to confer and did not confer upon any state the power to make injurious discriminations against the products of other states . . . ." *Brennan*, 90 S.E. at 404 (discussing Webb-Kenyon Act) (emphasis added). Under Section 2, as under the Wilson and Webb-Kenyon Acts,

> a [state] law may forbid entirely the manufacture and sale of intoxicating liquors, and be valid; or it may provide equal regulations for the inspection and sale of all domestic and imported liquors, and be valid. But the state cannot . . . establish a system which, in effect, discriminates between interstate and domestic commerce . . . .

*Scott*, 165 U.S. at 100 (discussing Wilson Act).

## CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals holding that the 21st Amendment does not authorize discriminatory or protectionist state laws, should be affirmed.

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Nos. 03-1116 & 03-1120

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In The
# Supreme Court of the United States

JENNIFER M. GRANHOLM, et al.,

*Petitioners,*

v.

ELEANOR HEALD, et al.,

*Respondents.*

MICHIGAN BEER &
WINE WHOLESALERS ASSOCIATION,

*Petitioner,*

v.

ELEANOR HEALD, et al.,

*Respondents.*

**On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## BRIEF OF THE GOLDWATER INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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## INTERESTS OF THE *AMICUS CURIAE*[1]

**The Goldwater Institute**, established in 1988, is a nonprofit, independent, nonpartisan, research and educational organization dedicated to the study of public policy. Through its research papers, editorials, policy briefings and forums, the Institute advocates public policies founded upon the principles of limited government, economic freedom and individual responsibility. One of the central missions of the Goldwater Institute is studying and promoting the elimination of government burdens on commerce and trade.

## SUMMARY OF THE ARGUMENT

The U.S. Constitution does not permit states to interfere with interstate commerce by enacting invidious and partial restraints on the flow of goods. The Commerce Clause also prevents differential treatment of in-state and out-of-state interests. Although Sec. 2 of the Twenty-first Amendment provides a means for state regulation of alcoholic beverages, it doesn't allow for discrimination against out-of-state interests. Accordingly, the Court should strictly scrutinize any state restrictions.

State schemes such as those in Arizona and Michigan do not narrowly address core concerns and are mostly designed to protect in-state liquor interests. A recent Goldwater Institute study confirmed that regulatory

[1] This brief is filed with the consent of the parties. No counsel to any of the parties to this matter authored this Brief in whole or in part. No person or entity other than the *amicus curiae* made a monetary contribution to the preparation and submission of this brief.

schemes such as those in Arizona greatly reduce consumer choice. Wines that are readily available on the internet are not otherwise available for purchase by Arizona consumers. Removing such state barriers will provide greater consumer choice and encourage continued e-commerce.

## ARGUMENT

### I. INTRODUCTION

Arizona is one of two dozen states that prohibit the direct shipment of out-of-state wine to consumers. Although the number of nationwide wineries and available wines has grown dramatically over the past thirty years, wholesalers continue to dictate the availability of out-of-state wines to Arizona consumers. This is done through a three-tiered distribution system.

The three-tiered distribution system requires that out-of-state producers sell their products to licensed wholesalers (tier 1), who then sell to retailers (tier 2), who make a selection of beverages available for sale to consumers (tier 3). Under Arizona law, an out-of-state producer's failure to use a licensed wholesaler is illegal. Ariz. Rev. Stat. § 4-243.01.[2] Domestic wineries, however, are not prohibited from directly selling and shipping to consumers. Ariz. Rev. Stat. § 4-205.04.[3] Because of Arizona's current prohibition on direct shipping, however, visitors

[2] See also Ariz. Rev. Stat. § 4-244; 19 Ariz. Admin. Code (A.C.C.) R1-202 – 1-204.

[3] See also Ariz. Rev. Stat. §§ 4-203.03, 4-203.04.

from several states cannot order directly from Arizona wineries. Specifically, California, Colorado, Hawaii, Idaho, Illinois, Iowa, Minnesota, Missouri, New Mexico, Oregon, Washington, West Virginia and Wisconsin are all "reciprocity" states. As a result of Arizona law prohibiting the direct shipment by out-of-state wineries, those states will not allow consumers located in their jurisdictions to order and directly purchase Arizona wine.[4]

A 2003 report by the Federal Trade Commission concluded that such bans on interstate direct shipping represent the single largest barrier to expanded e-commerce in wine.[5] The report also concludes that consumers would reap significant benefits if they had the option of purchasing wines online from out-of-state sources.[6] The benefits include a much greater variety of wine, lower costs, and the convenience of home delivery.[7]

## II. STATE LIQUOR DISTRIBUTION SCHEMES THAT FAVOR IN-STATE OVER OUT-OF-STATE INTERESTS VIOLATE THE COMMERCE CLAUSE

The United States Constitution grants Congress the power to "regulate commerce with foreign Nations and among the several States and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 4. James Madison explained that

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[4] See Wine Institute, Industry Background and Statistics (at <http://www.wineinstitute.org>) (accessed, Sept. 20, 2004).

[5] Staff of the Federal Trade Commission., "Possible Anticompetitive Barriers to E-Commerce: Wine," F.T.C. Report., July 3, 2003.

[6] *Id.*

[7] *Id.*

such a provision is necessary to ensure that states do not impose levies on imports and exports passing through their jurisdictions.[8] In other words, the Commerce Clause is intended to avoid the tendency toward economic Balkanization. *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979). It does this by keeping commercial intercourse among the States free from "invidious and partial restraints." *Gibbons v. Ogden*, 22 U.S. 1, 231 (1824). Chief Justice Marshall elaborates in *Gibbons* that, "[if] there was any one object riding over every other in the adoption of the Constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints."

In addition to the affirmative authority conferred upon Congress, the Commerce Clause also provides an implied limitation on state regulation affecting interstate commerce. Early on, the Supreme Court recognized the notion of a "dormant" Commerce Clause. *Wilson v. Black Bird Creek Marsh*, 27 U.S. 245 (1829) (a state law may be invalid if it is "repugnant to the power to regulate commerce in its dormant state"). The dormant Commerce Clause prevents differential treatment of in-state and out-of-state interests. *Dennis v. Higgins*, 498 U.S. 439, 447 (1991); see also, *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273 (1988) ("the Commerce Clause not only grants Congress the authority to regulate commerce among the States, but also directly limits the power of the States to discriminate against interstate commerce"). Thus, any state laws that are intended or actually benefit in-state economic interests at the expense of out-of-state interests are prohibited. *Oregon Waste Systems v.*

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[8] James Madison, *The Federalist Papers* No. 42 (Clinton Rossiter ed., 1961).

*Dep't of Environmental Quality*, 511 U.S. 93, 99 (1994); see also, *South-Central Timber Dev. v. Wunnicke*, 467 U.S. 82, 87 (1984) ("the [Commerce] Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce"). The Supreme Court has held that the fundamental purpose of the dormant Commerce Clause is to eliminate economic protectionism by preventing states from providing advantages for its residents at the expense of non-residents in matters of interstate commerce. *General Motors v. Tracy*, 519 U.S. 278, 299 (1997).

The Twenty-first Amendment, U.S. Const. amend. XXI, and the Commerce Clause both are parts of the United States Constitution. Accordingly, each should be read or interpreted in light of the other. As the Court noted in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, the Twenty-first Amendment did not "repeal" the Commerce Clause's relevance to state regulation of intoxicating liquors. *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-32 (1964) (holding that such a result "would be patently bizarre and is demonstrably incorrect"). Clearly, if the commodity at issue were grain or lumber, rather than liquor, there would be no dispute that regulations imposed by states are unconstitutional. *Id.* at 329. For example, state laws limiting the length of trucks on roadways, *Raymond Motor Transp. v. Rice*, 434 U.S. 429 (1978), the importation of waste, *Philadelphia v. New Jersey*, 437 U.S. 617, 620 (1978), and the transportation of fish, *Hughes v. Oklahoma*, 441 U.S. 322 (1979), have all been invalidated as impeding the free flow of commerce between the states.

In one of the most important cases decided after *Hostetter*, this Court was confronted with the issue of a

Hawaii tax exemption for locally produced alcoholic beverages. *Bacchus Imports v. Dias*, 468 U.S. 263 (1984).[9] In striking down that statute, this Court determined that Hawaii's tax exemption expressly reflected a discriminatory intent and was thus incapable of withstanding strict scrutiny review. *Id.* at 273. The Court also expressed that whatever the scope of the Twenty-first Amendment, its purpose was not to allow states to favor local liquor industries by erecting competitive barriers. *Id.* at 276.

The Supreme Court did recognize that temperance or other core concerns may be used to justify a state statute that interferes with interstate commerce. *Id.* This test, normally referred to as the "core concerns" analysis, examines state liquor statutes in light of recognized concerns such as temperance, prevention of monopolies, *Healy v. Beer Institute,* 491 U.S. 324, 342-43 (1989), and the collection of state taxes, *North Dakota v. United States*, 495 U.S. 423, 432 (1990). The existence of core concerns, however, does not eliminate the burden a state has in establishing that its discriminatory laws are the only means available to advance or protect those core concerns. The statutory schemes in both Arizona and Michigan fail to meet this test.

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[9] See *Brown-Forman Distillers v. N.Y. Liquor Auth.*, 476 U.S. 573 (1986) at 584, citing *Bacchus Imports v. Dias, supra*, for the proposition that state regulation of alcohol is reviewable under the Commerce Clause.

## III. STATE REGULATORY SCHEMES PROHIBITING THE DIRECT SHIPMENT OF WINE DO NOT NARROWLY ADDRESS STATE CONCERNS AND CREATE UNREASONABLE BARRIERS TO CONSUMER CHOICE

Because distribution systems such as those in Arizona and Michigan are discriminatory on their face, courts should apply a strict scrutiny standard when evaluating whether those statutes offend the Commerce Clause. Only narrowly tailored statutes that directly address legitimate state core concerns will be upheld. See *Capital Cities Cable v. Crisp*, 467 U.S. 691 (1984); accord *Bacchus Imports v. Dias, supra*; accord *West Lynn Creamery v. Healy*, 512 U.S. 186 (1994) (holding that "preservation of local industry by protecting it from the rigors of interstate competition is the hallmark of the economic protectionism that the Commerce Clause prohibits"). Arizona's statutes do not address the core concerns of temperance, prevention of consumption by minors, orderly market conditions or tax collection. The existing Arizona statutory scheme is designed to favor domestic wine products.

Reasonable measures can be added to state statutes to address core concerns and ensure alcoholic beverages are not delivered to minors. For example, other jurisdictions have implemented safeguards requiring the purchaser to provide a driver license number and credit card at the time of purchase or requiring the shipping agent to obtain proof upon delivery that the recipient is at least twenty-one years of age.[10] Moreover, there are no records to

[10] Va. Code Ann. § 4.1-112.1. Virginia law is similar to laws in other jurisdictions (e.g., Ga. Code Ann. § 3-6-31, La. Rev. Stat. Ann. § 26:359),

(Continued on following page)

suggest that temperance is even a concern or issue in Arizona.[11] Additionally, a recent report published by the Federal Trade Commission concluded that states with direct shipping have experienced few or no problems with shipments to minors.[12] Also, minors can already order (theoretically) on the Internet from wineries, thus, this is not a "new" or unique concern.

Another recognized core concern potentially justifying potential discrimination is the pursuit of "orderly market conditions." After the repeal of Prohibition, there was a concern that organized crime would continue to control the distribution of alcoholic beverages. *Dickerson v. Bailey*, 212 F.Supp.2d 673, 679-80 (S.D.Tex. 2002). Thus, many states adopted a three-tiered system to ensure "orderly market conditions."

Such concerns are of little relevance today and the phrase now is a euphemism for "wholesaler protection." The three-tiered system has created an environment where fewer and fewer wholesalers control more and more product.[13] For instance, one Arizona wholesaler, Southern

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and demonstrates that reasonable methods exist to address the potential for minors to receive shipped wine.

[11] On September 19, 2003, the Arizona Department of Liquor responded to a Goldwater Institute public records request by stating that, "The Department of Liquor Licenses and Control does not maintain records of citations or prosecutions concerning the importation of liquor into the state by minors. We have no historical record available on this subject matter."

[12] Federal Trade Commission, *Possible Anticompetitive Barriers to E-Commerce: Wine* (July 3, 2003). According to the report, states allowing for the direct sale and shipment of wine have not experienced any significant problems with underage consumption.

[13] The number of "wholesalers" of alcoholic beverages has decreased by over 75 percent over the past thirty years. At the same time,

(Continued on following page)

Wine & Spirits, has benefited from the continuing consolidation. Its eight-state operation brings in over $2 billion in annual revenue and Southern controls about 11 percent of all domestic wine and liquor consumption.[14] Not surprisingly, wholesalers have been the leading opponents of any change to the three-tiered distribution system.[15]

The last core concern that a state may invoke to justify curtailing the direct shipment of wine by out-of-state producers is that the shipment across state lines may impair revenue or tax collection. By itself, revenue generation is not a local interest that can justify discrimination against interstate commerce. *C&A Carbone v. Town of Clarkstown*, 511 U.S. 383 (1984). Moreover, the basis for such a concern is mostly speculative. For instance, if Arizona can collect taxes on shipments from in-state wineries, there is no reason why it cannot collect taxes on shipments from out-of-state wineries. For tax purposes, alcoholic beverages should be treated the same way as any other catalog, telephone, or Internet purchase. If the state can collect taxes on shipments of clothes or furniture from

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the number of wineries has increased over 500 percent. Thus, less than 17 percent of wineries are represented by distributors in all fifty states. Free the Grapes, Issue Summary (at <http://www.freethegrapes.org>) (accessed, Sept. 20, 2004).

[14] See, Alix M. Freedman & John R. Emshwiller, *Vintage System: Big Liquor Wholesaler Finds Change Stalking its Very Private World*, Wall Street Journal, p. A1 (Oct. 4, 1999).

[15] Wall Street Journal Editorial Board, *A Vintage Ruling*, Wall Street Journal, p. A8 (Apr. 5, 2002); see also, *A bill to allow direct shipment of out-of-state wines received heavy opposition from lobbyists for wine distributors and retailers*, East Valley Tribune, p. A6 (Sept. 17, 2003).

out-of-state, there is no reason why it cannot do the same with wine.[16]

Although e-commerce sales have continued to rise, traditional brick-and-mortar retailers and wholesalers have opposed increased Internet transactions.[17] In testimony concerning state impediments to e-commerce before the U.S. House of Representatives, Ted Cruz, Director of the Office of Policy and Planning of the Federal Trade Commission, stated that existing businesses may be seeking to use government authority to impede new entrants from competing.[18] Thus, American consumers are paying at least $15 billion more for goods and services as a result of e-commerce protectionism.[19]

Wine, unlike many other consumer goods, is unique. Wines are distinguished not only by color and region, but by the soil used to grow the grapes and the barrels in which they are stored or aged. Accordingly, every bottle of

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[16] Arizona could condition a direct shipping permit upon the collection of taxes. Several states have enacted similar legislation to ensure out-of-state wineries pay taxes on shipments to in-state consumers. See La. Rev. Stat. Ann. § 26:359(B); N.H. Rev. Stat. Ann. § 178:14a(V); Nev. Rev. Stat. Ann. § 369.462.

[17] U.S. Department of Commerce, U.S. Department of Commerce News, 2nd Quarter 2002 release (Aug. 22, 2002) E-commerce sales increased almost ten times greater than retail sales over a comparable quarter.

[18] Ted Cruz, *Prepared Statement of the Fed. Trade Comm'n: Before the Subcomm. On Commerce, Trade, and Consumer Prot. Comm. on Energy and Commerce*, U.S. House of Representatives, 107th Cong. (September 22, 2002).

[19] Robert D. Atkinson, *Revenge of the Disintermediated: How the Middleman is Fighting E-Commerce and Hurting Consumers*, Progressive Policy Institute (Jan. 26, 2001); see also, Brian Sullivan, *FTC says states' e-commerce laws hurt consumers*, ComputerWorld (July 18, 2002).

wine truly is distinct. Given the wide variety available, as well as recent studies suggesting the health benefits of wine,[20] it should not be surprising that Americans are drinking more wine than ever before.[21]

Distribution systems such as those in Arizona and Michigan whereby retailers must buy wines from a limited number of licensed wholesalers limit retailers to

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[20] Peter Jaret, medically reviewed by Gary D. Vogin, MD, *Bottoms Up: To Your Health*, WebMD Feature Archive 2001 (at <http://my.webmd.com/content/article/14/1671_51501.htm?lastselectedguid={5FE84E90-BC77-4056-A91C-9531713CA348}>) (accessed, Sept. 20, 2004), cites numerous studies that report the health benefits of wine, including: *Annals of Internal Medicine*, September 2000, reporting that light drinkers of wine cut risks of dying prematurely by one year; the *European Heart Journal*, January 2000, found that drinking wine appears to dilate arteries and increase blood flow reducing the risk of heart problems; scientists published in the journal *Pharmacology, Biochemistry, and Behavior*, May 2000, found that men and women around the age of 32 who had a glass or two of wine each day had significantly higher levels of "good" cholesterol because they remove the "bad" artery-clogging cholesterol before they can choke blood vessels; the *Journal of Nutrition and Biochemistry*, November 2000, reported similar findings, and found that the reduction of artery-clogging cholesterol reduced the likelihood of cardiovascular disease, such as heart disease and stroke; the *Journal of Cellular Biochemistry*, June 2000, reported that drinking wine in moderation may slow the growth of breast and prostate cancer cells; *Oncology Reports*, July-August 2000, similarly found that wine consumption can slow down the growth of liver cancer cells; additionally, the *Journal of the American Dental Association*, June 2000, found that wine consumption may inhibit the growth of oral cancer cells; a report in the *American Journal of Epidemiology*, April 2000, showed that women who drank one to three glasses of wine had greater bone mineral density; similarly, *Osteoporosis International*, November 2000, found that men, age 54-63, who drank a glass or two of wine a day also showed signs of greater bone mineral density.

[21] Wine Institute, Industry Background and Statistics (at <http://www.wineinstitute.org>) (accessed, Sept. 20, 2004).

essentially the same selection of wine. This restricts consumers' freedom of choice. While the opportunities are ample, the actual freedom to purchase wine from the vast Internet marketplace is extinguished under regulatory schemes such as those in Arizona and Michigan.

The Goldwater Institute recently conducted a study of the availability of a broad cross-section of wines.[22] A random variety of wines was selected. Some wines were regional selections, while others were from popular wineries with special vintages. All of the wines, absent Arizona regulations, were available for online purchase and direct delivery to the consumer. However, in a sampling of 15 specialty wines readily available for sale on the Internet, only two could be obtained from Arizona retailers, and one was available as to brand and variety, but not vintage. The other 12 could not be obtained at all. Clearly, consumer options are greatly diminished with state regulations that impede the direct shipment of out-of-state wines.

Prohibitions on the direct shipment of out-of-state wines not only leaves consumers with fewer choices, but the system also hurts local wineries by limiting their ability to ship wines to numerous jurisdictions. Large wholesalers, who benefit the most from the three-tiered distribution system, continue to oppose any changes.

Because distribution schemes such as those in Michigan unnecessarily discriminate against out-of-state producers, they should be struck down as contrary to the U.S. Constitution. Such a result will provide wine consumers with the benefit of a free market: more choice,

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[22] Jennifer Wright, *Stomping Grapes: How Arizona Tramples Consumer Choice in Wine*, Goldwater Institute (September 22, 2004).

greater convenience and lower prices. It will serve as a model for e-commerce trade as well.

## CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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**Nos. 03-1116, -1120 and -1274**

IN THE

# Supreme Court of the United States

JENNIFER M. GRANHOLM,
GOVERNOR OF MICHIGAN, *et al.*, *Petitioners*,
v.
ELEANOR HEALD, *et al.*, *Respondents*.

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,
*Petitioner*,
v.
ELEANOR HEALD, *et al.*, *Respondents*.

**On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit**

JUANITA SWEDENBURG, *et al.*, *Petitioners*,
v.
EDWARD D. KELLY, CHAIRMAN,
NEW YORK DIVISION OF ALCOHOLIC BEVERAGE CONTROL,
STATE LIQUOR AUTHORITY, *et al.*, *Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF *AMICUS CURIAE* OF ILLINOIS ALCOHOLISM AND DRUG DEPENDENCE ASSOCIATION IN SUPPORT OF PETITIONERS IN *GRANHOLM* AND RESPONDENTS IN *SWEDENBURG*

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## QUESTION PRESENTED

Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of Section 2 of the 21st Amendment?

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## CONSENT TO FILE

Consents to the filing of any *amicus* briefs in each of the consolidated cases were filed by the parties on July 9, 2004, July 13, 2004 and July 14, 2004.

## INTEREST OF *AMICI*[1]

The Illinois Alcoholism and Drug Dependence Association (IADDA) is an Illinois-based not for profit established in 1967. IADDA is involved in professional training, career development and advocacy for providers in the field of alcohol and drug dependency prevention, counseling and diversion. IADDA represents more than 100 prevention and treatment agencies. A list of its members is attached in the Appendix.

IADDA advocates for sound public policy to foster healthier families and safer communities. Its objectives are to work for effective treatment for addicted or drug-dependent people and for prevention, particularly among youth. Its public policy advocacy works to promote healthier individuals and safer communities by helping avoid the problems of dependence.

IADDA partners with two prevention programs. One, Illinois Teen Institute, operates an acclaimed prevention and positive peer influence program directed at teenagers. It involves youth in community planning for prevention of addiction and dependence. Its sponsored program, Teens Reaching For And Achieving Excellence (TRAX) involves teen leaders workshops around the state to

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[1] Neither party's counsel authored any portion of this brief. No person or entity other than *amici* made any monetary contribution to the preparation or submission of this brief. S. Ct. Rule 37.6.

prepare them and involve them in the anti-dependence and prevention drives. The other program, Operation Snowball, creates youth/adult partnerships to fight against use and dependence on tobacco, alcohol, and other drugs. Operation Snowball has 150 chapters working to involve communities in healthy decisionmaking.

IADDA maintains a web site linking both dependence providers and those involved in its affiliate efforts to government. http://www.iadda.org. The site facilitates access to the Illinois General Assembly, regulatory agencies, and welfare policymakers.

## SUMMARY OF ARGUMENT

The Constitutional law approach to the issue of direct shipping advocated by the Sixth Circuit treats liquor like any other commodity, the untrammeled trade of which should be promoted and protected by the Commerce Clause. Such an approach is at variance with the national welfare, public opinion, and the plain language of the Twenty-First Amendment to the United States Constitution.

It is indisputable that liquor is a dangerous drug and the drug that imposes the highest social and economic costs on American society. Many authorities, including those relied upon by direct shipping advocates, recognize that states legitimately may use taxes and other regulatory measures to promote temperance and curb alcohol abuse. Particularly now with the explosive growth of Internet sales, the Sixth Circuit's approach will wreak havoc on a state's abilities to regulate and control access to this dangerous drug.

## ARGUMENT

### I. The Commerce Clause Has Underpinned A Strong American Economy, But Its Unfettered Application Is Not Appropriate As To Liquor

Under the Articles of Confederation that preceded the United States Constitution, import-export duties and regulations hindered the development of a national economy. *See* Adam Badawi, *Uneasy Animosities and the Public Tranquility: Political Market Failure and the Scope of the Commerce Power*, 91 Cal. L. Rev. 1331 (2003). The Commerce Clause, Article I, Section 8, Clause 3 of the Constitution, has been a major force in creating a national free market. The Commerce Clause not only expressly conveys to Congress the power to regulate interstate trade, but has long been accepted as denying that power to state governments by negative implication. *Oregon Waste Systems, Inc. v. Department of Environmental Quality*, 511 U.S. 93, 98, 114 S. Ct. 1345, 1349 (1994).

As the authorities cited by the parties in the cases now before this Court on writ of *certiorari* make clear, a notable exception to the plenary authority of Congress under the Commerce Clause is the authority -- however broad or narrow -- to regulate liquor granted to the states by Section 2 of the Twenty-First Amendment of the Constitution.

Some commentators and some decisions have found further cause or function for the negative implication of the Commerce Clause. *See, e.g.*, Douglas Smith, *Interstate Commerce and the Principles of the Law of Nations*, 2004 Utah L. Rev. 111, 131 (2004). Arguing that it provides a useful tool for invalidating protectionism or special interest legislation, they contend it has been invaluable in fostering a free market in the United States and that largely because of it,

American consumers get minimum prices and optimum economic performance. By placing the interstate portion of the economy beyond the interference of much state government regulation, the Constitution has facilitated a more *laissez-faire* economic system.

The parties opposing direct shipping laws make no attempt to hide the fact that they seek to promote and protect their ability to make liquor as widely and cheaply available as possible. In their Brief in Opposition to the Petitions for Writs of Certiorari, the Respondents in the Sixth Circuit cases open and close with references to and repeatedly cite a Report by the Staff of the Federal Trade Commission, *Possible Anticompetitive Barriers to E-Commerce: Wine 5* (July 2003) ("Report"). In the Report the staff concludes:

> states could significantly enhance consumer welfare by allowing direct shipment of wine to consumers. Through direct shipping, online wine sales offer consumers lower prices and greater selection.

*Id.* at 3.

There is more to the issue before this Court than free trade, however. The fact that nearly 40 state attorneys general have added their voices in favor of alcohol regulation and against open shipping testifies to that.

The American public does not believe that minimum pricing and maximum consumption is desirable for all commodities and all industries. Congress in some cases has responded to that public concern by banning or tightly regulating the commodity with Commerce Clause authority. Heroin is an example. *See* 21 U.S.C. § 841.

Alcohol is an even better example. Congress twice has placed before the states constitutional amendments to

regulate alcohol as an alternative to exclusive Commerce Clause regulation. Both were ratified by the states and both dealt with alcohol. The Eighteenth Amendment introduced Prohibition and banned alcohol. The Twenty-First Amendment repealed Prohibition and granted regulatory authority to the states over the transportation or importation of alcohol.

Courts have recognized the power of states to ban alcohol totally, *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 853 (7th Cir. 2000), to permit political subdivisions to ban it, *Allstate Beer, Inc. v. Julius Wile Sons & Co., Inc.*, 479 F. Supp. 605 (N.D. Ga. 1979), and to ban it at specific times or in particular places. *Levendis v. Cobb County*, 250 S.E.2d 460, 242 Ga. 592 (Ga. 1979); *Oklahoma Alcoholic Beverage Control Board v. Parkhill Restaurant, Inc.*, 669 P.2d 265, 1983 Ok. 77 (Ok. 1983).

Most Americans do not want to maximize the availability and consumption of alcohol by minimizing price. In a 2003 national poll by Wirthlin Worldwide, 83% of respondents agreed that Internet sales should not be allowed because they would give minors easier access to alcohol. *New Survey Confirms Majority of Americans Oppose Internet Alcohol Sales*, Oct. 22, 2003, *at* http://www.cheaphostingdirectory.com/news/20031022alcohol. (citing a 2003 WirthlinWorldwide survey). 77% of Americans oppose permitting direct sales of alcohol by Internet or mail, as do 71% of self-identified alcohol consumers, and 85% of non-drinkers. *Id.* In Texas during 2000, a poll found that 71% disagreed with the statement: "Manufactures of any product including alcoholic beverages, should have the right to sell directly to consumers over the Internet." *The Three-Tier System: Texans Overwhelmingly Reject Direct Shipment of Alcohol* (2000), *at* http://www.texassafetynetwork.org/internet/three/survey.htm

(citing a statewide public opinion poll). In Chicago, Illinois, 24 partial and 16 full precincts have voted to go "dry" since 1992. Mayor Richard Daley has noted that a "bad liquor establishment can tear the fabric of a neighborhood and send it into decline." Chicago Magazine, *The Dry Season*, July 2003.

As the foregoing illustrates, prudent use is a more favored social objective than wide-open access where liquor is concerned. This should be recognized in evaluating the competing schemes of legal analysis for state regulation of alcohol.

The Report acknowledges that "some states may explicitly pursue a policy of elevating prices above competitive levels to promote temperance." *Id.* at 26-27. In fact, the National Academy of Sciences has recommended that "Congress and state legislatures should raise excise taxes to reduce underage consumption ..." Report of the National Academy of Sciences, *Reducing Underage Drinking: A Collective Responsibility* at 11 (September 2003) *at* http://www.marininstitute.org/alcohol_policy/UnderageDrinking_Exec_Summary.

A 2002 article summarizing the economic research on the effect of price on alcohol consumption found that:

> This research, which has used a wide variety of data, generally has concluded that increases in the price of alcoholic beverages lead to reductions in drinking and heavy drinking as well as in the consequences of alcohol use and abuse.

Frank J. Chaloupka *et al.*, *The Effects Of Price On Alcohol Consumption and Alcohol-Related Problems*, 26 Nat'l. Acad.

Sci. 1, 22 (2003). One of the studies commended in the review found:

> After controlling for State and year effects, the investigators concluded that a $1 increase in the per gallon liquor tax can reduce gonorrhea rates by 2.1 percent; furthermore a beer tax increase of 20 cents per six-pack can reduce gonorrhea rates by 8.9 percent. Similar, or even somewhat larger, effects of liquor and beer taxes were found for syphilis rates.

*See id.* at 30.

## II. Alcohol Is Responsible For More Social And Economic Damage To The American Public Than All Other Drugs Combined.

Statistics on violence, divorce, crime, fetal alcohol syndrome, spousal and child abuse, DUI killings and maimings, and lost work time clearly demonstrate the terrible social and economic cost our society pays for the imprudent use of alcohol.

The economic cost of liquor abuse in America is estimated at $185 billion, while that for illicit drugs is estimated at $161 billion. Underage drinkers and adult excessive drinkers account for an aggregate 50.1% of total alcohol consumption in the United States. Glen R. Hanson & Ting-Kai Li, *Public Health Implications of Excessive Alcohol Consumption*, 289 JAMA 8, 1031 (Feb. 26, 2003). Approximately one-third of U.S. adults exceed the guidelines defining excessive consumption. *Id.* at 1032. A recent Illinois state government survey found that 10% of eighth graders and 36% of twelfth graders reported binge drinking. Press Release, *Governor Blagojevich Calls for More Federal Funding to Prevent the Dangers of Binge Drinking: Study Shows Heavy Drinking Isn't Just on College Campuses*

(April 7, 2004). The Report that the direct shipping advocates repeatedly cite confirms what should be sobering statistics on youth access to alcohol:

> In 2002 approximately 68% of eighth graders, 85% of tenth graders, and 95% of twelfth graders said that it is "fairly easy" or "very easy" to get alcohol. Underage alcohol use imposes significant costs, in both human terms and economic terms. Although the numbers are very difficult to quantify, one study estimated that, in 1996, the total cost of underage drinking—including traffic crashes, violent crimes, burns, drowning, suicide attempts, fetal alcohol syndrome, alcohol poisoning, and treatment—was $52.8 billion.

*Id.* at 11.

Those numbers are significant for many reasons. Alcohol is associated with violence. The National Institute on Alcohol Abuse and Alcoholism (NIAA) has found that:

> Excessive alcohol consumption is frequently a factor in violence toward women. These events range from being the recipient of verbal aggression . . . to battery, rape, and death. Recent findings among women who reported sexual assaults include higher levels of alcohol consumption, both their own and the perpetrators, and sexual risk-taking.

NIAA, *Strategic Plan 2001-2005* at 20 *at* http://www.niaa.nih.gov. 50-60 % of male alcoholics report violent behavior toward women. *Id.*

Further, "[a]lcohol abuse is associated with high-risk sexual behavior and injection drug use, two of the major modes of human immunodeficiency virus transmission."

Hanson & Li, *supra*, at 1031. *The Christian Science Monitor* noted in a report on underage drinking that:

> experts say (sex) . . . is a factor advertisers exploit, often to the detriment of girls more than boys. 'Bad girls make good company,' reads one ad for Cuervo rum. In a Martell Cognac ad, a sultry woman is on display with a plea to 'be at least capable of bad.'

*New Face of Underage Drinking: Teenage Girls*, Christian Science Monitor, July 13, 2004.

The adverse impact of alcohol on the young is well-established. Drinking increases "the chances that teenagers will become adult heavier drinkers with alcohol problems later in life". Susan E. Foster, et al., *Alcohol Consumption and Expenditures for Underage Drinking and Adult Excessive Drinking*, 289 JAMA 8, 989 (Feb. 26, 2003); B.F. Grant & D.A. Dawson, *Age of Onset of Alcohol Use and its Association with DSM-IV Alcohol Abuse and Dependence: Results from the National Longitudinal Alcohol Epidemiological Survey*, J. SUBSTANCE ABUSE, 9, 103-110 (1997). Prenatal contact with alcohol is highly detrimental: "We found more serious cognitive impairment in relation to alcohol than cocaine or other drugs, including marijuana or smoking" (Dr. Sandra Jacobson, Wayne State University). Linda Carroll, *Fetal Brains Suffer Badly from Effects of Alcohol*, N.Y. Times, Nov. 4, 2003, available at http://www.nytimes.com/. "Fetal alcohol syndrome, a serious disorder affecting brain function, is the leading preventable birth defect in the U.S." *Id.*

## III. Illinois' Liquor Law Is Designed To Regulate Imported Liquor

Illinois is home to many large liquor retailers, such as Sam's Wine & Spirits, Binny's, and Walgreen's. Illinois, however, has relatively few wineries and distilleries and no major breweries, so a very high percentage of the alcohol sold is imported. Illinois law looks to and derives its authority from the Twenty-First Amendment. For example, the direct shipping provision of the Illinois Liquor Control Act of 1934 provides:

> Pursuant to the Twenty-First Amendment of the United States Constitution allowing states to regulate the distribution and sale of alcoholic liquor and pursuant to the federal Webb-Kenyon Act declaring that alcoholic liquor shipped in interstate commerce must comply with state laws, the General Assembly hereby finds and declares that selling alcoholic liquor from a point outside this State through various direct marketing means, such as catalogs, newspapers, mailers and the Internet, directly to residents of this State poses a serious threat to the State's efforts to prevent youths from accessing alcoholic liquor; to State revenue collections; and to the economy of this State.

235 Ill. Comp. Stat. 5/6-29.1 (1934). *See also* Illinois Beer Industry Fair Dealing Act, 815 Ill. Comp. Stat. 720/2 ("This Act is promulgated pursuant to authority of the State under the provisions of the Twenty-First Amendment to the United States Constitution ..."); *Erfor Corp. v. State of Illinois Liquor Control Commission*, 47 Ill. App. 3d 72, 361 N.E.2d 776 (Ill. App. Ct. 1977) ("The source of state power to control alcoholic beverages is the police power as fortified by the twenty-first amendment of the United States Constitution.")

In Illinois, retailers must determine age eligibility, observe operating hours, halt bawdy conduct and gambling, prevent disorderly conduct, and must not intoxicate patrons. 235 Ill. Comp. Stat. 5/6-16; *Spiros Lounge, Inc. v. State of Illinois Liquor Control Commission*, 423 N.E.2d 1366, 1372, 98 Ill. App. 3d 280, 287 (Ill. App. Ct. 1981) (sales to minor justified revocation); *Jager v. Illinois Liquor Control Commission*, 392 N.E.2d 176, 182, 74 Ill. App. 3d 33 (Ill. App. Ct. 1979), (repeated altercations as grounds for revocation); *Show of Shows, Inc. v. Illinois Liquor Control Commission*, 230 N.E.2d 268, 271, 86 Ill. App. 2d 109 (Ill. App. Ct. 1967) (solicitation of drinks by female employee warranted revocation); *Daley v. Jack's Tivoli Liquor Lounge*, 254 N.E.2d 814, 819, 118 Ill. App. 2d 264 (Ill. App. Ct. 1969) (sexual solicitation of police officer by prostitute vouched for by bartender warranted revocation); *Daley v. Rifkin*, 228 N.E.2d 224, 226, 84 Ill. App. 2d 467 (Ill. App. Ct. 1967) (evidence that bartender steered patron to prostitute justified revocation).

An Illinois importing distributor must be licensed as a distributor. 235 Ill. Comp. Stat. 5/5-1(c). An importing distributor must hold received alcohol in his warehouse from receipt until delivery to a retailer. 235 Ill. Comp. Stat. 5/6-8. A tax measured by volume is imposed on importing distributors and must be paid within 15 days of the month following delivery to a retailer. 235 Ill. Comp. Stat. 5/8-1; 235 Ill. Comp. Stat. 5/8-2. A distributor may only deliver to a licensed retailer. 235 Ill. Comp. Stat. 5/1-1(b).

Common carriers delivering alcohol into Illinois are required to file shipment manifests with the Illinois Liquor Control Commission. 235 Ill. Comp. Stat. 5/8-12. Consequently, reconciliation of the manifest information with the distributor tax filing and the warehouse inventory creates a fail-safe system for tax collection. If manifested product is

not in the inventory, it has been delivered and tax is due. 235 Ill. Comp. Stat. 5/8-2. Further, the tax document verifies that the distributor is only selling to retailers, not consumers, because the retailer must remit the sales tax to the state, accounting for the product. 235 Ill. Comp. Stat. 5/8-14. This distribution system means that sales to consumers go through licensed retailers and, as set forth above, Illinois polices retailers by inventory control to assure that taxes are paid and that sales are not made to minors or in furtherance of undesirable conduct.

Illinois permits some limited direct shipment to Illinois consumers, 235 Ill. Comp. Stat. 5/6-29, while maintaining a general prohibition. 235 Ill. Comp. Stat. 5/6-29.1. Retail inventory control is a regulatory scheme which serves to limit youth access.

## IV. This Case Will Have A Substantial Impact On The Ability Of Illinois And Other States To Maintain Control Of Imported Alcohol

This Court now has before it decisions by the Second Circuit and the Sixth Circuit Courts of Appeals that take radically different views of the authority to regulate the importation of intoxicating liquor granted to the states by the Twenty-First Amendment and of the interplay between the Twenty-First Amendment and the dormant Commerce Clause. The very basis of their analyses differs.

The Second Circuit essentially looks at the scope of authority granted by the Twenty-First Amendment and allows states to regulate the importation of liquor in any rational fashion within that scope.

The Sixth Circuit, however, employs a two-step approach, starting with a dormant Commerce Clause analysis

and, if the state statute fails to pass a "strict scrutiny" test, proceeding on to determine whether the statute is somehow "saved" by the Twenty-First Amendment.

The Sixth Circuit approach effectively reduces the Twenty-First Amendment to surplusage and prevents a state from regulating alcohol in a fashion any stricter than it may regulate other goods in interstate commerce.

Consider:

- An out of state Internet seller with no physical presence in Illinois sells directly to an Illinois liquor retailer. Under the current law requiring physical presence to establish Commerce Clause nexus with a taxing state, the State of Illinois has no ability to impose a sales or use tax on the seller. *See Quill Corporation v. North Dakota*, 504 U.S. 298, 112 S. Ct. 1904 (1992); *National Bellas-Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 87 S. Ct. 1389 (1967). The state loses not only revenue, but the ability to use high taxes to depress consumption. Furthermore, the state must deploy more resources or divert existing resources to ensure that only licensees are selling, and selling within the limits of the law.
- Under Illinois law, a distributor must operate a strictly controlled warehouse. The inventory can be ascertained by the deliveries made and reported from the common carrier delivery manifests. The distributor pays a tax when product at the warehouse is delivered to a licensed retailer. However, if an Illinois distributor were to purchase product over the Internet and have it delivered directly to the retailer, tracking, regulating and taxing the product would become infinitely more difficult for the State. An untraceable, unidentified supply of liquor will

encourage failure to pay tax and lower prices, making liquor more accessible to minors.

According to a July 2004 report released by the National Governor's Association and the National Conference of State Legislators, sales over the Internet topped $104 billion in 2003, a nearly 40% jump over the previous year. *See* Forrester Research, Inc., *The Growth Of Multichannel Retailing*. The volume of sales over the Internet has grown exponentially in the years since this Court last interpreted the Twenty-First Amendment. There is no reason to think that growth will not continue.

This is undoubtedly true with respect to alcohol sales to minors, as well. A 2000 poll by Americans for Responsible Alcohol Awareness found 80% of college students say their peers are likely to purchase alcohol over the Internet, as no age verification is required. *National Survey: 80% of College Students Say Peers Likely to Purchase Alcohol Online* (April 4, 2000) *at* http://www.texassafetynetwork.org/news/reporter/eightypercent. Volume alone will render it increasingly hard for state's to prevent and police such sales.

## V. The *Swedenburg* Analysis Facilitates State Efforts To Control Improper Alcohol Use

The Second Circuit's approach in *Swedenburg* requires state liquor control schemes to be rational exercises of power pursuant to the purpose of the Twenty-First Amendment. It necessarily looks to a state's regulatory structure to find meaning for any particular component subject to challenge.

The Sixth Circuit's logic in *Granholm* starts by treating liquor the same as if it were any other commodity,

like autos, milk, or furniture. If it finds discriminatory treatment of out-of-state-sourced liquor, it defaults to Commerce Clause strict scrutiny.

The Sixth Circuit approach is inconsistent with the language of the Twenty-First Amendment prohibiting importation in violation of the state's laws and ignores the overwhelming medical and economic evidence that liquor is the dangerous drug most affecting American society. Furthermore, it flies in the face of the explosive development of a new distribution technology that threatens to swamp efforts at liquor regulation, the Internet.

Illinois predicates its liquor tax collection system on distributor collection and payment. The Internet can go around it. Under the Sixth Circuit approach, perhaps Illinois could find a way to collect the tax from out-of-state sources. But it would succeed only if *Quill* does not apply, if Congress permits, if presence is not required, and if the Internet shipper can actually be found. It makes a high tax/lower consumption strategy for liquor control virtually a dead letter.

Collection from in-state sources will be more difficult if not impossible. A state cannot police its sales tax collections if Internet delivery to retailers becomes physically possible. The suggestion that the state do more physical audits comparing inventory to sales tax remissions and distributor delivery reports is unrealistic. Illinois has 25,000 retail liquor licensees. Constant physical surveillance of retail sites is not a feasible enforcement option. Physical surveillance of cyberspace is virtually impossible.

If a state predicates underage distribution control on retail carding to determine eligibility, it still may be able to impact diversion to minors if direct shippers are physically

present in the state because the state has much more intimate supervision of how the shippers conduct business. Internet sites can open and close in a click.

Currently, the circuits are split on direct sales of liquor. An Internet industry in liquor looms. Illinois, like other states, has a system that uses inventory controls to tax and monitor retail sales. Undermining the tools of control will not help. Imposing Commerce Clause strict scrutiny for a test of Twenty-First Amendment rational purpose will promote uncontrolled, unregulated liquor sales. If states can effectively regulate the development of this industry, the political branches of government may devise a strategy for dealing with this dangerous product.

## CONCLUSION

The judgment of the Second Circuit Court of Appeals in *Swedenburg v. Kelly*, 358 F.3d 223 (2d Cir. 2004) should be affirmed and the judgment of the Sixth Circuit Court of Appeals in *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003) reversed.

Dated: July 29, 2004

Respectfully submitted,

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# APPENDIX

# ILLINOIS ALCOHOLISM AND DRUG DEPENDENCE ASSOCIATION AGENCY MEMBERS
**July 7, 2004**

## REGION 1

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In The
# Supreme Court of the United States

JENNIFER M. GRANHOLM, Governor, *et al.*,

*Petitioners,*

v.

ELEANOR HEALD, *et al.*,

*Respondents.*

MICHIGAN BEER AND
WINE WHOLESALERS ASSOCIATION,

*Petitioner,*

v.

ELEANOR HEALD, *et al.*,

*Respondents.*

**On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## BRIEF OF MEMBERS OF THE UNITED STATES CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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## INTEREST OF THE CONGRESSIONAL *AMICI CURIAE*[1]

The Congressional *amici* are a bipartisan group of Senators and Representatives with an interest in the outcome of this case and its effect on the implementation and interpretation of the Twenty-first Amendment Enforcement Act. The Congressional *amici* have a strong interest in the Court's continuing interpretation of the Commerce Clause to prohibit state laws that discriminate against out-of-state commerce, and they oppose state laws that economically discriminate or whose purpose is economic protectionism for in-state businesses.

The Twenty-first Amendment Enforcement Act of 2000, 27 U.S.C. § 122a, gives state attorneys general the power to seek injunctive relief in federal courts against violators of state laws regulating the importation and transportation of intoxicating liquor. Subsection (e) of the Act, "Rules of Construction," guides the federal courts on the jurisdictional question and looks to this Court for interpretation. It provides that federal jurisdiction should be construed to extend only to a "State law that is a valid exercise of power vested in the States ... under the twenty-first article of amendment to the Constitution of the United States as such article of amendment is interpreted by the Supreme Court of the United States including interpretations in conjunction with other provisions of the Constitution of the United States."

Congressional debate on the "Rules of Construction" provision focused on Supreme Court decisions interpreting the purpose and effect of the Twenty-first Amendment in light of the Commerce Clause. Specifically mentioned with

---

[1] A list of the individual members of Congressional *amici* is included in the Appendix. Pursuant to Sup. Ct. R. 37.6, the Congressional *amici* affirm that this brief has been prepared solely by counsel for the *amici*. The Coalition for Free Trade and Family Winemakers of California made monetary contributions for the preparation and submission of this brief. Letters from all parties consenting to the filing of this brief have been filed with the Clerk.

approval during debate were *Bacchus Imports, Ltd. v. Dias* and other cases holding that the Twenty-first Amendment did not repeal the Commerce Clause as it applies to intoxicating liquor, and that the Twenty-first Amendment, therefore, must be considered in the context of Congress' power to regulate interstate commerce.[2] The cases now before the Court will define the relationship between the Commerce Clause and the Twenty-first Amendment and the scope of the laws to restrict the importation of intoxicating liquor states can enforce pursuant to the Twenty-first Amendment Enforcement Act.

## SUMMARY OF ARGUMENT

The Court's decisions establish that, in exercising authority to regulate the importation of alcohol for use and distribution within its borders, a state may not discriminate against or burden interstate commerce unless it can show that the discriminatory aspects of its laws and regulations advance one of the core concerns of the Twenty-first Amendment and there is no reasonable, nondiscriminatory alternative. Michigan cannot meet either burden.

Petitioners and *amici* advance several arguments in their challenge to the precedent and constitutional jurisprudence that support the Sixth Circuit's discussion in *Heald v. Engler*.[3] They contend that, in enacting the Wilson and Webb-Kenyon Acts, Congress delegated to the states the authority to regulate the importation and transportation of alcohol in any way they saw fit, including discriminating against interstate shipments. But the plain language and legislative histories of the Wilson Act, the Webb-Kenyon Act, and the Twenty-first Amendment

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[2] *Healy v. Beer Inst.*, 491 U.S. 324 (1989); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964).

[3] 342 F.3d 517 (6th Cir. 2003).

Enforcement Act make clear that Congress did not do so. The Wilson Act of 1890, by its express terms, does the opposite of authorizing discrimination against interstate commerce. It reversed the "Original Package Doctrine," subscribes to uniformity of treatment, and authorizes states to exercise their police powers to restrict the importation of alcoholic beverages "to the same extent *and in the same manner* as though such liquids or liquors had been produced in such state or territory." *Id.* (emphasis added).

The Webb-Kenyon Act of 1913 continued Congress' objective of authorizing states to regulate in-state and out-of-state products evenhandedly. By passing the Twenty-first Amendment, Congress did not seek to depart from the uniformity between in-state and out-of-state interests that it had mandated in the earlier statutes; section 2 of the Twenty-first Amendment enshrined that nondiscriminatory intent in the Constitution.

The Twenty-first Amendment Enforcement Act of 2000, which most of the Congressional *amici* signing this brief voted for, authorizes state attorneys general to seek injunctions in federal court to enforce state anti-liquor laws. But Congress set limits; federal jurisdiction is available *only* if the laws are valid exercises of power under the Twenty-first Amendment as "interpreted by" this Court, "including interpretations in conjunction with other provisions of the Constitution." The Act's directive that it not "be construed to grant to States any additional power" is a powerful reaffirmation that Congress has not delegated authority to the states to discriminate against out-of-state shipments of wine.

Some *amici* seek to deflect the focus of the argument to the dangers of youth access to alcohol in general, rather than the precedent and constitutional jurisprudence that should govern this case. In *44 Liquormart, Inc. v. Rhode Island*, *Reno v. ACLU*, and other cases, the laudable goal of protecting youth collided with other constitutional provisions. This Court's approach in First Amendment and Commerce Clause cases has been to protect the constitutional value, whether it be commercial speech or interstate

commerce, by placing the burden of proof on the proponent of the statutory restriction. The proponent must demonstrate that the measures are necessary to achieve the legitimate goals and that there is no less discriminatory or restrictive alternative that achieves the statute's goals. Michigan's law fails both tests.

First, the discriminatory aspects of Michigan's provisions violate the Commerce Clause by permitting in-state wineries to make direct shipments to consumers, while barring out-of-state wineries from doing so, or making it more burdensome for them to do so. In-state wineries are permitted to ship their products directly to consumers, but Michigan requires out-of-state wineries to ship to licensed wholesalers, and it bans their direct shipments to Michigan consumers. Out-of-state wineries must pay twelve times more ($300) for a license to sell to a Michigan wholesaler than in-state wineries. The discriminatory Michigan statutes and regulations do not square with its valid interest in protecting youth against consumption of alcoholic beverages.

Second, there are ample nondiscriminatory means to achieve Michigan's goals. A 2003 Federal Trade Commission report found that any marginal advancement in youth protection or other core Twenty-first Amendment concerns achieved by a discriminatory ban could be achieved in a less discriminatory manner. The FTC identified more than twenty states that permit interstate direct wine shipping and found that many have adopted nondiscriminatory alternatives for regulating direct shipping by out-of-state wineries. According to the Report, states "experience[ ] few, if any, problems with interstate direct shipment of wine to minors."[4] Those less restrictive alternatives include: (1) permit or license requirements for out-of-state shippers, including mandatory remittance of taxes; (2) labeling and delivery requirements that ensure that wine is delivered only to adults; (3) enforcement mechanisms,

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[4] Federal Trade Commission Report entitled "Possible Anticompetitive Barriers to E-Commerce: Wine" (2003) ("FTC Report") at 4.

including stiff penalties for violations of state direct shipment laws; (4) state cooperatives for interstate use tax collection; and (5) use tax reporting requirements on state income tax forms.

The undersigned Members of Congress share the view that neither the Twenty-first Amendment nor any other federal legislation gives the states authority to discriminate against out-of-state alcohol for the purpose of economic protectionism.

## ARGUMENT

### I. The Sixth Circuit's Decision Is Consistent With Precedent Striking a Balance Between the Dormant Commerce Clause and the Twenty-first Amendment.

In exercising authority to regulate the importation of alcohol for use and distribution within its borders, a state may not discriminate against or burden interstate commerce unless it can show that the discriminatory aspects of its laws and regulations advance one of the core concerns of the Twenty-first Amendment and there is no reasonable, nondiscriminatory alternative. The Sixth Circuit correctly determined, under a traditional dormant Commerce Clause analysis, that Michigan's laws unconstitutionally discriminate against out-of-state wine shippers.

#### A. Traditional Dormant Commerce Clause Strict Scrutiny Applies to State Exercises of Power Under the Twenty-first Amendment.

Under *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 578-79 (1986),[5] a state statute that directly regulates or discriminates against interstate commerce, or has the effect of favoring in-state

[5] Citing *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Shafer v. Farmers Grain Co.*, 268 U.S. 189 (1925); and *Edgar v. MITE Corp.*, 457 U.S. 624 (1982) (plurality opinion).

economic interests over out-of-state interests violates the Commerce Clause. A discriminatory statute may stand but only if the state can demonstrate that the discrimination advances a legitimate local purpose that cannot be served by a reasonable, nondiscriminatory alternative. *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988). The proponent state must demonstrate, however, that the discriminatory aspects of the statute specifically advance that legitimate local purpose. *See id.* at 279-80. States have substantial latitude to regulate commerce within their respective borders so as to promote the health and safety of their citizens, but their efforts remain subject to the dormant Commerce Clause:

> [A] finding that state legislation furthers matters of legitimate local concern, even in the health and consumer protection areas, does not end the inquiry. Such a view . . . "would mean that the Commerce Clause of itself imposes no limitations on state action . . . save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods."

*Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 350 (1977) (quoting *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951)).[6]

Traditional dormant Commerce Clause strict scrutiny is appropriate for state statutes and regulations that discriminate against out-of-state wine shippers. Where, as here, laws facially discriminate and a state is unable to establish that its asserted goal could not be achieved in a nondiscriminatory manner, its invalidity is conclusively established, "despite the fact that the law regulates the sale of alcoholic beverages, since its discriminatory character eliminates the immunity afforded by the Twenty-first Amendment." *Healy v. Beer Inst.*, 491 U.S. 324, 344 (1989)

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[6] *See also City of Philadelphia*, 437 U.S. at 626-27; *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 957 (1982); *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

(Scalia, J., concurring). In the context of the Twenty-first Amendment, a statute that is determined to be discriminatory in purpose or effect may be a permissible exercise of state authority only if the interests implicated by the state regulation are closely related to one of the core values of the Twenty-first Amendment – temperance, raising revenue, or orderly markets – and there is no reasonable nondiscriminatory alternative. *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 275 (1984). Michigan's laws do not meet either test.

### B. Michigan's Laws Discriminate Against Out-of-State Wineries.

The Michigan laws economically discriminate in purpose and effect by differentiating between in-state and out-of-state wineries. Michigan maintains a three-tier distribution system for wine and beer, requiring that licensed manufacturers sell to licensed wholesalers, which then sell to licensed Michigan retailers. Retailers then sell the wine and beer to Michigan consumers. Michigan requires that out-of-state wineries that produce and bottle their own wine obtain an "outstate seller of wine license" to be able to deliver, ship, or transport their wine into Michigan. *See* Mich. Admin. Code r. 436.1705(2)(d) (2004) (governing "outstate seller of wine licenses"). However, the holder of an "outstate seller of wine license" may ship its product only to a licensed wholesaler in Michigan, with the only exception being on written order otherwise from the Michigan Liquor Control Commission. Mich. Admin. Code r. 436.1719(5) (2004). There is no procedure to obtain a written exception to the requirement that an out-of-state winery ship its product only to a licensed wholesaler. Brief of Petitioners Michigan State Officials ("Michigan Br.") at 8. In reality, then, an out-of-state winery never may ship its product directly to a Michigan consumer. *Id.* In contrast, Michigan wineries may bypass the three-tier system to sell their wine at retail and deliver it directly to Michigan consumers. *Id.* at 7, 8. To sell wine to a Michigan

wholesaler, an out-of-state winery must pay twelve times ($300) the amount that in-state wineries pay ($25) to be able to ship directly to consumers. *Heald v. Engler*, 342 F.3d 517, 521 (6th Cir. 2003).[7]

Acknowledging the differences between its treatment of in-state and out-of-state wineries, Michigan defends on the grounds that its "regulatory framework" as a whole "clearly serves valid regulatory purposes of 'promoting temperance,' 'controlling the distribution of liquor,' and 'raising revenue.'" Michigan Br. at 32. Michigan asserts that it has chosen to permit in-state wineries to bypass the three-tier system because Michigan can still collect taxes and assess meaningful sanctions for noncompliance with its alcohol and beverage control laws, Michigan Br. at 7, and that "[t]he point of Michigan's system is that it addresses Michigan's need to protect its citizens by preventing the sale of alcohol to minors while promoting responsible drinking and to ensure the collection of taxes." *Id.* at 33. These generalized explanations, however, fail to provide any evidence that the *discriminatory aspects* of Michigan's regulatory system – *i.e.*, permitting in-state wineries to ship directly, but effectively prohibiting out-of-state

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[7] The Sixth Circuit correctly held that all of these differentials combined to benefit in-state wineries and burden out-of-state wineries and noted that:

> Michigan wineries enjoy both greater access to consumers who wish to have wine delivered to their homes, and greater profit through their exemption from the three-tier system. Out-of-state wineries, on the other hand, must participate in the costly three-tier system, to their economic detriment and, although this is not clear from the record, may be shut out of the Michigan market altogether if unable to obtain a wholesaler.

*Heald*, 342 F.3d at 525. In contrast, the Second Circuit erred in *Swedenburg v. Kelly*, 358 F.2d 223 (2d Cir. 2004), also before this Court for review in No. 03-1274, when it ignored the acknowledged economic protectionist purpose and effect of New York's laws and held them to be constitutional. *See Swedenburg v. Kelly*, 232 F. Supp. 2d 135, 146 (S.D.N.Y. 2002) (New York's Attorney General acknowledged that economic protectionism was the purpose of the in-state farm winery exception to its ban on direct shipments of wine).

wineries to do so – themselves advance any of the core values of the Twenty-first Amendment.

Michigan's argument that it may still advance these core values of the Twenty-first Amendment, *notwithstanding* the benefits it accords to in-state wineries, misses the point. As *Bacchus*, *New Energy*, *Brown-Forman*, and Justice Scalia's concurrence in *Healy* make clear, the test is whether the discriminatory aspects of the statute advance those legitimate goals, not whether those goals may still be met without reference to the special treatment for in-state wineries. Also, despite Michigan's failure to demonstrate that the benefits it accords in-state wineries advance core concerns of the Twenty-first Amendment, Michigan has several nondiscriminatory alternatives available to it to achieve its legitimate regulatory goals. *See* Part IV *infra*.

## II. The Arguments of Petitioners and Their *Amici* Are Contrary to Precedent and Congressional Action.

Petitioners and *amici* make several arguments to avoid the force of the Court's decisions. They argue that the discriminatory aspects of Michigan and New York's regulatory schemes constitute legitimate exercises of power under the Twenty-first Amendment.[8] They contend that the Twenty-first Amendment removed state alcohol regulation from the purview of the dormant Commerce Clause and Congress delegated its commerce authority to the states to regulate alcohol in any rational manner, therefore strict scrutiny does not apply to these statutes

[8] *See* Brief of Petitioner Michigan Beer & Wine Wholesalers Association ("Michigan Beer & Wine Wholesalers Br.") at 20-22, 24-34, Michigan Br. at 15-30, *Amicus Curiae* Brief of Ohio and 32 Other States ("Ohio Br.") at 12-17, and *Amicus Curiae* Brief of the National Alcohol Beverage Control Association and the National Conference of State Liquor Administrators ("NABCA Br.") at 10-12.

and regulations.[9] These arguments are contrary to the controlling decisions of this Court and Congressional action mandating otherwise.

### A. Several Decisions By This Court Reject the Argument That the Twenty-first Amendment Repealed the Commerce Clause's Application to Wine.

The Twenty-first Amendment did not elevate the states' authority above the Commerce Clause or any other provision of the Constitution.[10] *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964), rejected as an "absurd oversimplification" the notion that the Twenty-first Amendment had "somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquor is concerned" and observed that "[b]oth the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." 377 U.S. at 331-32.[11]

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[9] *See* Michigan Beer & Wine Wholesalers Br. at 18-20, Michigan Br. at 36-38, Ohio Br. at 17-18, NABCA Br. at 12-14, Brief of *Amicus Curiae* the Wine and Spirits Wholesalers of America, *et al.* ("Wine and Spirits Wholesalers Br.") at 20-21, and Brief of *Amicus Curiae* National Beer Wholesalers Association ("NBWA Br.") at 6-7.

[10] *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Healy v. Beer Inst.*, 491 U.S. 324 (1989); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964).

[11] As petitioners and *amici* concede, laws passed in an exercise of Twenty-first Amendment powers remain subject to other constitutional provisions, such as the Export-Import Clause, the First Amendment, the Equal Protection Clause, and the Due Process Clause. *See, e.g., Dep't of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964) (Export-Import Clause); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S.

(Continued on following page)

*Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), affirms that laws passed in an exercise of Twenty-first Amendment powers remain subject to the dormant Commerce Clause. The *Bacchus* majority observed that

> [d]oubts about the scope of the Amendment's authorization notwithstanding, one thing is certain: The central purpose of the provision was not to empower States to favor local liquor industries by erecting barriers to competition. . . . State laws that constitute mere economic protectionism are therefore not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor.

*Id.* at 276. Likewise, a unanimous Court in *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984),[12] relied upon years of precedent in holding that the Twenty-first Amendment "does not license states to ignore their obligations under other provisions of the Constitution."

Together, these decisions reject the notion that the Twenty-first Amendment removed state regulation of alcohol from the purview of the dormant Commerce Clause.

### B. Congress Has Not Delegated to the States Its Commerce Clause Authority Over Interstate Shipment of Wine.

Congress has not delegated authority to the states to discriminate economically in the field of alcohol regulation. On the several occasions it has enacted legislation regarding state regulation of intoxicating beverages, Congress has done the opposite of authorizing state discrimination. In the early laws, Congress rectified an

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484 (1996) (First Amendment); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (Equal Protection Clause).

[12] Citing *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122 n.5 (1982); *California v. LaRue*, 409 U.S. 109, 115 (1972); *Constantineau*, 400 U.S. at 436; and *James B. Beam Distilling Co.*, 377 U.S. at 345-46.

imbalance that left interstate shipments freer from state regulation than intrastate shipments. The foundation of this legislation was uniformity. Congressional concern with uniform treatment of in-state and out-of-state alcoholic beverages continues to the present day.

### i. The Wilson Act Explicitly Requires Uniform Application of State Laws.

In 1890, Congress enacted the Wilson Act,[13] to address the peculiar disparity between treatment of domestic and interstate alcohol that had grown out of court decisions. During the nineteenth century, states could exercise their local police power to regulate alcoholic beverages within their borders and to prohibit the in-state manufacture and sale of alcohol, but could not use that power to discriminate in favor of in-state products. *See License Cases*, 46 U.S. (5 How.) 504 (1847); *Walling v. Michigan*, 116 U.S. 446, 454 (1886). At the same time, however, states were prevented from prohibiting shipments from outside the state that were resold within the state in their original packages (the "Original Package Doctrine"). *See Bowman v. Chicago & N.W. Ry.*, 125 U.S. 465 (1888); *Leisy v. Hardin*, 135 U.S. 100 (1890). These decisions had the anomalous effect of discriminating in favor of out-of-state alcohol sellers because states could forbid domestic production of alcohol but could not stop alcohol imports. In response, Congress enacted the Wilson Act to empower the states to impose the same regulation on imported alcohol as domestic alcohol.

The Wilson Act insists on uniformity of treatment for in-state and out-of-state liquor shipments:

> [a]ll . . . intoxicating liquors transported into any state or territory, . . . shall upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, *to the*

[13] Act of Aug. 8, 1890, ch. 728, 26 Stat. 313 (codified at 27 U.S.C. § 121).

> *same extent and in the same manner as though such liquids or liquors had been produced in such state or territory*, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

27 U.S.C. § 121 (emphasis added). In upholding the constitutionality of the Wilson Act, the Court held that its purpose was to resolve the conflict created by the Original Package Doctrine between the immunity accorded interstate goods under the dormant Commerce Clause and the states' police power:

> [s]o long, however, as state legislation continues to recognize wines, beer, and spirituous liquors as articles of lawful consumption and commerce, so long must continue the duty of the federal courts to afford to such use and commerce the *same measure of protection, under the constitution and laws of the United States, as is given to other articles.*

*Scott v. Donald*, 165 U.S. 58, 91 (1897) (emphasis added). *Scott* underscored that the Wilson Act was to be nondiscriminatory; it "was not intended to confer upon any state the power to discriminate injuriously against the products of other states in articles whose manufacture and use are not forbidden, and which are, therefore, the subjects of legitimate commerce." *Id.* at 100.[14]

### ii. The Webb-Kenyon Act Did Not Delegate Authority to the States to Discriminate Economically.

The same nondiscrimination principles are preserved in the Webb-Kenyon Act.[15] The Webb-Kenyon Act was

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[14] The Wilson Act remains in effect, and this Court has never questioned the continuing validity of *Scott*.

[15] First enacted in 1913, Act of Mar. 1, 1913, c. 90, § 1, 37 Stat. 699 (codified as 27 U.S.C. § 122) and re-enacted without change again in 1935, Act of Aug. 27, 1935, c. 740, § 202(b), 49 Stat. 877.

enacted to close a loophole forcing dry states to allow the importation of alcohol shipped interstate. In the wake of the Wilson Act, the Supreme Court had held a state's power to prevent the sale of alcohol in its original package in violation of its laws did not attach until receipt and delivery to the consignee of the alcohol shipped from another state. *Rhodes v. Iowa*, 170 U.S. 412, 426 (1898). To remedy the problem faced by the dry states, Congress once more reacted, this time with the Webb-Kenyon Act. It was "enacted simply to extend that which was done by the Wilson Act; that is to say, its purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in states contrary to their laws. . . . " *James Clark Distilling Co. v. W. Md. Ry.*, 242 U.S. 311, 323-24 (1917). Senator Sanders spoke to the gap left by the Wilson Act and the purpose of the Webb-Kenyon Act:

> As it is a State can protect its citizens against one another, but not against outsiders. A State can regulate the quality of liquor sold within the State, but it can not regulate the quality of liquor sold from outside the State. . . . There is here an invasion of State rights and a helplessness of States to protect themselves. They must therefore look to the National Government for relief. That is the object of this bill.

49 Cong. Rec. 700 (1912).

In passing the Webb-Kenyon Act, therefore, Congress sought only to assist the states in exercising their local police power to ensure compliance with state laws proscribing the sale of liquor, by permitting that power to attach to items shipped interstate before receipt by and delivery to the end-user. There is no indication that Congress intended to allow states to discriminate economically against interstate alcohol. To the contrary, the Webb-Kenyon Act, like its predecessor the Wilson Act, was intended to maintain regulatory parity for alcoholic beverages produced within the state and outside the state.

The Webb-Kenyon Act was enacted against the backdrop of the nondiscrimination principles highlighted in the text of the Wilson Act and the Court's decisions in *Scott v. Donald*, 165 U.S. 58 (1897), *License Cases*, 46 U.S. (5 How.) 504 (1847), *Mugler v. Kansas*, 123 U.S. 623 (1887), and *Walling v. Michigan*, 116 U.S. 446, 454 (1886). All established that under their police power, states could regulate the local manufacture and sale of alcohol, but could not use that power to discriminate in favor of in-state products. As Senator Williams explained during debate over passage of the Webb-Kenyon Act,

> Congress has just as much power to prescribe that the termination of an interstate transaction shall be at the State line as it has to prescribe that it shall cease at the consignee's door. The only reason the Supreme Court ever held otherwise was because Congress had not passed any act regulating interstate commerce upon this subject in such a way as to give the courts the right so to decide. . . . I think wherever Congress in the exercise of its power to regulate interstate commerce can exercise the power so as to be aidful and helpful to the States in the exercise of their police powers, that it ought to do so, and wherever possible not exercise it so as to restrict and restrain the States in the exercise of their police powers.

49 Cong. Rec. 4298 (1913). These principles were confirmed in *McCormick & Co. v. Brown*, 286 U.S. 131, 141 (1932), which held that "there is no reason for denying to the Webb-Kenyon Act its intended application to prevent the immunity of transactions in interstate commerce from being used to impede the enforcement of the states' valid prohibitions" enacted pursuant to the states' police powers reserved to them under the Tenth Amendment.

Despite the clear purpose of the Webb-Kenyon Act, petitioners and *amici* suggest that, in enacting it, Congress intended to remove state regulation of alcohol

from the purview of the dormant Commerce Clause.[16] But "for a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be *unmistakably clear*." *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984) (emphasis added). The debates surrounding the Webb-Kenyon Act, certainly do not evidence such "unmistakably clear" intent to delegate. To the contrary, the debates suggest that state regulation was not removed from the reach of the dormant Commerce Clause. Senator McCumber emphasized the absence of any such delegation:

> If the act is made clear that we do not put into effect a State law when the commodities arrive in such State or *do not delegate our authority in any manner to the State*, but simply provide a condition under which the commodity may lose its commercial [immunity] character, and thereby become subject to the laws of the State, the second section may be so framed as to be held constitutional.

49 Cong. Rec. 702 (1912) (emphasis added).[17] Such an understanding did not change over time. *See* 76 Cong. Rec. 4140 (1933) (Statements of Senators Wagner and Blaine in debating passage of the Twenty-first Amendment that, in

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[16] *See* Michigan Beer & Wine Wholesalers Br. at 19-20, Michigan Br. at 36-38, Ohio Br. at 17-18, NABCA Br. at 12-14, Wine and Spirits Wholesalers Br. at 20-21, and NBWA Br. at 6-7.

[17] *See also* 49 Cong. Rec. 702 (1912) (Statement of Sen. McCumber that "imposing the condition that the goods shall be so subjected to the laws of a State is not in any sense whatever delegating authority to the State to control by its legislation interstate commerce"); *id.* at 704-05 (Statement of Sen. McCumber comparing the Webb-Kenyon Act with an act prohibiting interstate commerce in birds or animals killed in any state violation of that state's law and observing, "I hardly think anyone would contend that this prohibition is a delegation of authority to the State. It is simply a condition under which the shipment may or may not be made"); *id.* at 705 (Statement of Sen. McCumber: "[Congress] does not delegate its power to a State. It recognizes its own authority over the article as an article of interstate commerce and says it is no longer a subject of commerce, and being no longer a subject of commerce it falls of itself under the Laws of the State in which it is then located.").

enacting the Webb-Kenyon Act, Congress did not delegate to the States the power to regulate interstate commerce, but instead "Congress itself regulated interstate commerce to the point of removing all immunities of liquor in interstate commerce"). As Senator Kenyon, one of the Act's sponsors, stated, "its purpose, *and its only purpose*, is to remove the impediment existing as to the States in the exercise of their police powers regarding the traffic and control of intoxicating liquors within their borders." 49 Cong. Rec. 707 (1912) (emphasis added). Rather than expressing an "unmistakable intent" to remove state regulation of alcohol from the reach of the dormant Commerce Clause, then, Congress displayed its intent that state regulation continue to be subject to it.

### iii. Nor Did Congress Delegate Commerce Power to the States in Section 2 of the Twenty-first Amendment.

Like the Wilson and the Webb-Kenyon Acts, the Twenty-first Amendment was passed to remove impediments to the states' nondiscriminatory exercise of their police power over all alcohol – this time by repealing Prohibition and the overreaching federal police power that attended it and assuring that dry states could enforce their valid police powers to prohibit interstate liquor in the same manner as in-state liquor. There is no evidence in the legislative history of the Twenty-first Amendment that Congress intended section 2 to permit the states to enforce economically discriminatory laws. Rather, the history points to the purpose of section 2 as being to assure dry states that they could constitutionally and effectively exercise their police powers by treating interstate liquor the same as in-state liquor. According to Senator Borah, a dry-state senator,

> the eighteenth amendment would never have been adopted had it not been for the open, brazen, corrupt, persistent defiance of the laws of the dry States by the liquor interests outside those States. At the time the eighteenth amendment was

> adopted, 33 States had prohibition in some form. The people had declared they wanted to be rid of this evil, or at least to control it in their own way. These States were invaded, their laws broken, their officials corrupted, by the same influences which now plead for States rights and local control. They did not at that time respect that right at all. They trampled upon it and scoffed at it. Therefore, if we are to have what we are now promised, local self-government, States rights, the right of the people of the respective States to adopt and enjoy their own policies, we must have some other method, some other provisions of the Constitution, than those which existed prior to the adoption of the eighteenth amendment.
>
> All this was sought to be remedied by the Webb-Kenyon Act, and I am very glad indeed the able Senator from Arkansas has seen fit to recognize the justice and fairness to the States of incorporating it permanently in the Constitution of the United States.

76 Cong. Rec. 4172 (1933).[18] Instead of granting to the states *carte blanche* to discriminate economically, section 2 of the Twenty-first Amendment enshrined the Webb-Kenyon Act in the Constitution, thereby assuring dry states that they could exercise their police powers to prohibit the sale of liquor within their borders.[19]

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[18] *See* 76 Cong. Rec. 4141 (1933) (Statement of Sen. Blaine: "So, to assure the so-called dry States against the importation of intoxicating liquor into those States, it is proposed to write permanently into the Constitution a prohibition along that line . . . [T]he pending proposal will give the States that guarantee."). *See also* 76 Cong. Rec. 4168 (1933) (Statement of Sen. Fess: "In other words, the second section of the joint resolution that is now before us is designed to permit the Federal authority to assist the States that want to be dry to remain dry.").

[19] *See* 76 Cong. Rec. 4170 (1933) (Statement of Sen. Borah); 76 Cong. Rec. 4171 (1933) (Statement of Sen. Wagner); 76 Cong. Rec. 4172 (1933) (Statements of Senators Lewis and Borah), expressing the same sentiment.

This Congressional concern with effective uniform enforcement of state police power was highlighted in the debate surrounding a proposed, but ultimately rejected, section 3 of the Twenty-first Amendment.[20] The problem with proposed section 3 was that – because federal law is supreme – there could be no actual "concurrent" exercise of police power by the federal and state governments with regard to saloons. Therefore, the federal government could continue to interfere with wholly local police power in regulating local use and distribution of alcohol. As Senator Wagner put it, proposed section 3 would "not restore to the States responsibility for their local liquor problem. It does not withdraw the Federal Government from the field of local police regulation into which it has trespassed." 76 Cong. Rec. 4144 (1933).[21]

### iv. The Twenty-first Amendment Enforcement Act Contemplates the Enforcement of Only Valid, Nondiscriminatory State Laws.

In 2000, Congress enacted the Twenty-first Amendment Enforcement Act.[22] It provides federal jurisdiction for state attorneys general seeking injunctive relief for violations of state alcohol laws regulating the importation and transportation of intoxicating liquor. 27 U.S.C. § 122a(c). That federal jurisdiction is available only for state laws that constitute valid exercises of power vested in the states under the Twenty-first Amendment, as "interpreted

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[20] "Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold." 76 Cong. Rec. 4141 (1933) (Statement of Sen. Blaine).

[21] Other Senators identified the same problem with proposed section 3. *See* 76 Cong. Rec. 4143 (1933) (Statement of Sen. Wagner); 76 Cong. Rec. 4145-48 (1933) (Statements of Sen. Wagner); 76 Cong. Rec. 4161 (1933) (Statement of Sen. Norris); 76 Cong. Rec. 4170-71 (1933) (Statement of Sen. Borah).

[22] 27 U.S.C. § 122a.

by the Supreme Court of the United States including interpretations in conjunction with other provisions of the Constitution of the United States." 27 U.S.C. § 122a(e)(1). The Twenty-first Amendment Enforcement Act "shall not be construed to grant to States any additional power." 27 U.S.C. § 122a(e)(2). In other words, federal jurisdiction is available only for those state laws that do not violate any other provision of the Constitution, including the dormant Commerce Clause.

The requirement that state laws be otherwise constitutional is manifest in the debates leading to enactment. Senator Feinstein, a member of the Senate Judiciary Committee, made clear that

> this provision is simply a jurisdictional statute with a very narrow and specific purpose. The bill is not intended to allow the enforcement of invalid or unconstitutional State liquor laws in the Federal courts, and is certainly not intended to allow States to unfairly discriminate against out-of-State sellers for the purposes of economic protectionism.

146 Cong. Rec. 10214 (2000). Senator Feinstein further expressed the view that the Twenty-first Amendment Enforcement Act is premised on those many Supreme Court cases holding that the Twenty-first Amendment "does not diminish the force of the supremacy clause, the establishment clause, the export-import clause, the equal protection clause, and, again, the commerce clause; nor does it abridge rights protected by the first amendment." *Id.* at 10215.[23] The amendment to the bill encompassing

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[23] *See also* 146 Cong. Rec. 9046 (2000) (Statement of Rep. Radanovich that previous versions of the Twenty-first Amendment Enforcement Act would have permitted states to discriminate unfairly against out-of-state sellers for economic protectionist purposes, but "[s]uch protectionism would clearly be a violation of the Commerce clause of the Constitution; thus, the current version of this legislation does not allow for such protectionist acts"); 146 Cong. Rec. 9039 (2000) (Statement of Rep. Hyde, Chair of the House Judiciary Committee, affirming that the rules of construction language "is an implicit recognition of the

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this understanding was passed by a unanimous voice vote in the Senate committee and became subsection (e) of the enacted Twenty-first Enforcement Act. *Id.*

## III. The Laudable Interest in Protecting Youth Does Not Nullify Application of the Commerce Clause to the Michigan Laws.

Ignoring decades of Court decisions, some *amici* attempt to divert the Court's attention toward the broad issue of youth access to alcohol rather than the questions of whether the Michigan laws materially advance the state's asserted legitimate goals and whether there are less restrictive alternatives available.[24] The decisions that *amici* ignore hold that a state's asserted interest in temperance does not trump constitutional provisions, including traditional Commerce Clause concerns, when less restrictive alternatives for accomplishing a state's asserted goal exist.

First Amendment jurisprudence provides a helpful framework within which to evaluate the many problems with *amici's* approach. First Amendment precedent has long required that states, in exercising their power to limit youth access to harmful materials, narrowly tailor their restrictions so that free speech is burdened in only the most limited ways. *See 44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 507 (1996); *see also Lorillard Tobacco*

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Supreme Court decisions made over the last 35 years holding that the 21st [sic] Amendment cannot be read in isolation from other provisions contained in the U.S. Constitution"); 145 Cong. Rec. 6871 (1999) (Statement of Rep. Conyers: "neither this act nor Webb-Kenyon are in anyway designed to supersede any other provision of the Constitution, such as the first amendment or the Commerce clause (including the so-called 'dormant' Commerce clause). In this regard, the amendment reaffirms the Supreme Court's 1984 decision in *Bacchus Imports* [sic] *v. Dias*, 468 U.S. 263 (1984), which held that a state law which imposed an excise tax on sales of liquor but exempted certain locally produced alcoholic beverages violated the Commerce clause.").

[24] *See* Ohio Br. at 22-24 and *Amicus Curiae* Brief of Michigan Association of Secondary School Principals, *et al.* ("MASSP Br.") at 5-22.

*Co. v. Reilly*, 533 U.S. 525, 563 (2001). A state's asserted interest in promoting temperance under the Twenty-first Amendment clashed with the First Amendment in *44 Liquormart*. There, this Court reviewed Rhode Island statutes prohibiting the advertising of alcoholic beverage prices. As in *Heald*, Rhode Island's asserted interest was to promote temperance. *Id.* at 504. *44 Liquormart* held that the statutes unconstitutionally restricted protected speech for two reasons.

First, the state failed to demonstrate that its regulations would advance the state's interest and, second, the state failed to show that the statutes were narrowly tailored. *Id.* at 505-07. Rhode Island's expressed interest in protecting youth was not the end of the analysis. Rather, if a state regulation merely mitigated the harm the state sought to remedy, the regulation would not pass muster. *See id.* at 505. Specifically, "a commercial speech regulation 'may not be sustained if it provides only ineffective or remote support for the government's purpose.'" *Id.* (quoting *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980)). A state, therefore, has the burden of showing not only that its direct-shipment restrictions will advance temperance, but that they will do so "to a material degree." *See Edenfield v. Fane*, 507 U.S. 761, 771 (1993).

The balancing articulated by *44 Liquormart* is not a constitutional anomaly. A number of other First Amendment cases hold that speech considered harmful when directed toward children may not be curtailed if, on balance, the regulation unduly burdens speech that adults may legally receive. *See Reno v. ACLU*, 521 U.S. 844, 875 (1997). *See also Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 252 (2002) ("The precedents establish . . . that speech within the rights of adults to hear may not be silenced completely in an attempt to shield children from it.").

*Reno v. ACLU* struck down the Communications Decency Act ("CDA"), holding that the statute did not offer the least restrictive means of achieving the government's goals. 521 U.S. at 876-79. While recognizing that the government's

interest in safeguarding the well-being of children was compelling and justified, *id.* at 869-70, this Court nonetheless declared the content-based regulation to be unconstitutional because it was not narrowly tailored to further that interest. *Id.* at 879. The Court recited strict scrutiny's "least restrictive means" test: "[The] burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." *Id.* at 874. The Court invalidated the CDA because it did not employ devices that would restrict youth access, while at the same time permit adults to receive non-obscene speech. *Id.* at 876-79.

Likewise, a state law or regulation complies with the dormant Commerce Clause if it materially advances an asserted state interest, and does so through the least restrictive means. *See New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988); *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 957 (1982); *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979); *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 353 (1977); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951). The test of the constitutionality of the Michigan statute under the dormant Commerce Clause should parallel the analysis in *44 Liquormart*. As a threshold matter, because the direct shipment scheme burdens only out-of-state interests, leaving in-state shipments virtually unobstructed, the benefits achieved through the legislation are doubtful. The risk that minors will have greater access to alcohol via direct shipment is not alleviated by placing disparate burdens on out-of-state producers while allowing for direct-shipment of in-state wine.

To the extent that concern about youth access is advanced as a reason to prevent out-of-state wineries from shipping their products, Michigan ignores that its regulations prevent adults from obtaining certain wines that may be available to them only through direct shipment from the winery. To paraphrase, the kind of beverages available to adults cannot be limited to that which would be suitable for the school cafeteria. *See Reno*, 521 U.S. at 874. On the other hand, the argument that Michigan's regulations prohibiting

out-of-state wineries from shipping wine to consumers advance the goal of preventing minors from obtaining alcohol through direct shipments does not withstand scrutiny because the same regulations expressly permit in-state wineries to bypass the three-tier system and ship their products directly to Michigan consumers.

Just as the mere possibility of mitigating alcohol abuse was not enough to save the Rhode Island regulation in *44 Liquormart*, that the Michigan law might mitigate youth exposure to wine, while affecting adult consumption of wine, is insufficient. Michigan's ban of direct sales to consumers by out-of-state wineries cannot pass constitutional muster under the Commerce Clause. The burden on adult speech is unacceptable when less restrictive alternatives would be effective in advancing the state's legitimate purpose. For the same reasons, the burden on interstate commerce is unacceptable when nondiscriminatory alternatives are available to Michigan to achieve its core goals of limiting youth access and promoting temperance. *See* Part IV, *infra*.

## IV. A 2003 FTC Report on Direct Shipment of Wine Lists Many Nondiscriminatory Alternatives to Advance the States' Core Concerns.

Petitioners and *amici* argue that a ban on, or restrictions for, direct shipments by out-of-state wineries are the only manner in which a state can ensure that wine is not illegally shipped to minors or that taxes are not avoided. But a July 2003 FTC Report entitled "Possible Anticompetitive Barriers to E-Commerce: Wine"[25] ("FTC Report")

[25] The FTC Report was signed by all five of the FTC's Commissioners and its major bureaus. FTC Report at i. Additionally, on October 30, 2003, a hearing was held in the House, *E-Commerce: The Case of Online Wine Sales and Direct Shipments: Hearing Before the Subcommittee on Commerce, Trade, and Consumer Protection of the House Committee on Energy and Commerce*, 108th Cong. 2 (2003) ("October 30, 2003 Hearing"), which focused on the FTC Report. During the hearing, certain Representatives found the FTC Report's findings,

(Continued on following page)

identifies numerous reasonable nondiscriminatory alternatives that other states have implemented: (1) permit or license requirements for out-of-state shippers, including mandatory remittance of taxes; (2) labeling and delivery requirements that ensure wine is delivered only to adults; (3) state cooperatives for interstate use tax collection; (4) use tax reporting requirements on state income tax forms; and (5) enforcement mechanisms, including stiff requirements for non-compliance.

***Permits***. According to the FTC Report, several states that allow interstate direct shipments require out-of-state shippers to obtain a permit or license to ship wine directly to consumers.[26] FTC Report at 27. States often require that such license holders remit taxes on their shipments, comply with state regulations regarding labeling and delivery of shipments, and pay a license fee. *Id.* at 28-29. States can also require that a winery submit to the state's jurisdiction and comply with its alcohol shipment laws as conditions for receiving a license.[27] *Id.* at 27. New Hampshire, for example, allows any winery currently licensed in

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conclusions, and recommendations persuasive. *See, e.g.*, October 30, 2003 Hearing at 3 (Statement of Rep. Stearns: "If the FTC staff report's analysis holds true for markets other than just McLean, Virginia, I find it persuasive that States should pursue less restrictive forms of regulation of direct interstate wine sales than outright bans."); *id.* at 6 (Statement of Rep. Radanovich: "The FTC Report that we will hear today discusses the various methods some States and shipping companies use to protect children. Notably, the report states that there are no documented non-sting cases of juvenile access to wine shipments generated from on-line sales. . . . Given this and other favorable aspects of the FTC Report, I believe Congress has the responsibility to allow consumers the choice to purchase wine on-line and give this venue a chance to grow and expand.").

[26] *See, e.g.*, Neb. Rev. Stat. § 53-123.15(4) (2004); Nev. Rev. Stat. §§ 369.450, .490 (2003); N.H. Rev. Stat. Ann. § 178:27 (2003); N.C. Gen. Stat. § 18B-1001.1 (2004); N.D. Cent. Code § 5-01-16(5) (1987); S.C. Code Ann. § 61-4-747 (Law. Co-op. 2003); Va. Code Ann. § 4.1-112.1 (Michie 2003); Wyo. Stat. Ann. § 12-2-204 (2003).

[27] *See, e.g.*, S.C. Code Ann. § 61-4-747(C)(6) (Law. Co-op. 2003); Wyo. Stat. Ann. § 12-2-204(d)(vii) (2003).

its state of domicile to apply for an interstate direct shipping permit with the New Hampshire Liquor Commission. N.H. Rev. Stat. Ann. § 178:27(I)(a) (2003).[28] Wyoming and other states employ similar licensing schemes. Wyoming allows direct shipments of wine to consumers if the out-of-state winery agrees to remit a tax of twelve percent of the retail price of each shipment of wine; pay a license fee of fifty dollars; and ship no more than a total of eighteen liters of wine to any one household per year. Wyo. Stat. Ann. § 12-2-204 (2003). In South Carolina, a licensed out-of-state winery must pay a four-hundred-dollar fee every two years, remit all taxes due to the state at the same rate as if the sale were made in South Carolina, and agree not to ship more than twenty-four bottles of wine each month to one person. S.C. Code Ann. § 61-4-747 (Law. Co-op. 2003). To ship into Nebraska, an out-of-state winery must pay a fee of five hundred dollars, remit a gallonage tax if a tax on the wine has not already been paid, and ship no more than nine liters per year. Neb. Rev. Stat. §§ 53-124(11); 53-160; 53-194.03 (2004).

***Labeling***. States can also impose labeling and delivery requirements similar to those imposed in retail stores to ensure that wine is delivered only to a legal adult. FTC Report at 29. Some states require that wine be shipped in boxes that are clearly marked "Alcoholic Beverages, adult signature (over 21 years of age) required."[29] States also

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[28] The out-of-state winery may ship up to sixty individual containers of not more than one liter of wine to any consumer per year. N.H. Rev. Stat. Ann. § 178:27(III). All direct shippers must pay a fee of 8 percent of the retail price of wine shipments to the state liquor commission and file with the commission a monthly tax report showing all shipments of alcohol into New Hampshire, with copies of invoices attached. N.H. Rev. Stat. Ann. § 178:27(V). The winery must keep these records on hand for three years to allow the state to perform an audit of the direct shipper's filings upon request. *Id.*

[29] *See, e.g.*, N.H. Rev. Stat. Ann. § 178:27(II) (2003); N.C. Gen. Stat. § 18B-1001.1(c) (2004); N.D. Cent. Code § 5-01-16(5) (1987); S.C. Code Ann. § 61-4-747(c)(2) (Law. Co-op. 2003); Va. Code Ann. § 4.1-112.1(C) (Michie 2003); Wyo. Stat. Ann. § 12-2-204(d)(iii) (2003).

require that wine be delivered by common carrier (*e.g.*, UPS and FedEx), and that carriers obtain the signature of a legal adult upon delivery and verify the age of the recipient by requesting appropriate identification.[30] These measures place a duty on both the shipper and the carrier to ensure that wine is not delivered to a minor.

That some states that prohibit interstate direct shipping allow intrastate direct shipping shows that these states are able to exercise sufficient regulatory control over direct shipping through the labeling and delivery requirements outlined above. While Michigan prohibits interstate direct shipping, it allows in-state wineries to ship directly to consumers, provided that (1) shippers affix to the package a label clearly stating that the package contains alcohol and that an adult signature and identification are required upon delivery; and (2) the person who delivers the package verifies that the recipient is of legal age and has the proper identification. Mich. Comp. Laws § 436.1203 (2004). If these measures are sufficient to prevent in-state wine from being delivered to minors, surely these same measures are sufficient to prevent out-of-state wine from being delivered to minors. *See* FTC Report at 28.

***Taxes***. With regard to revenue collection concerns, the FTC Report found that measures such as "requiring out-of-state suppliers to obtain permits and to collect and remit taxes" protected tax revenues in a less restrictive manner than a direct ban on out-of-state shipments. FTC Report at 38. There are even more nondiscriminatory measures through which states can achieve this goal. States can work together to ensure increased collection of use taxes. New York, New Jersey, and Connecticut have a Cooperative Interstate Sales and Use Tax Administration

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[30] *See, e.g.*, Nev. Rev. Stat. 369.450(2)(a)(1) (2003); N.H. Rev. Stat. Ann. § 178:27(II) (2003); N.C. Gen. Stat. § 18B-1001.1(c)(1) (2004); N.D. Cent. Code § 5-01-16(5) (1987); Va. Code Ann. § 4.1-112.1(C) (Michie 2003); Wyo. Stat. Ann. § 12-2-204(d)(iv) (2003).

agreement to exchange sales and use tax information.[31] Under the agreement, participating vendors selling taxable goods and services across state lines voluntarily agree to collect the neighboring state's use tax. Sharing information about customers and purchases, improves use tax collection and increases state revenues. Some states have revised state income tax forms to address the failure of consumers to remit use taxes because they are not aware of use tax laws. They have done so by adding a line on state income tax forms requiring taxpayers to report the amount of purchases the taxpayer made from mail-order catalogs and online retailers.[32]

***Enforcement***. If out-of-state shippers fail to comply with license requirements, labeling and delivery requirements, or tax remittance, states have multiple means of enforcement available. First, states attach stiff penalties to violations of direct shipment laws. New Hampshire, one of the states identified in the FTC Report as having effectively implemented less restrictive means,[33] revokes the shipping permit of a person found to be shipping wine to minors and charges that person with a Class B felony. *See* N.H. Rev. Stat. Ann. § 178:27(VII) (2003). If, as a condition to being licensed, a shipper has submitted to the state's jurisdiction, the state can sue the shipper in state court. If the shipper is an unlicensed violator, the state has federal jurisdiction to

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[31] *Available at* http://www.tax.state.ny.us/pdf/publications/Sales/Pub32_1196.pdf (last visited September 21, 2004).

[32] *See* North Carolina 2003 Individual Income Tax Form D-400 *available at* http://www.dor.state.nc.us/downloads/individual.html (last visited September 21, 2004). Michigan, Maine, Vermont and many other states have added similar lines to their tax forms. *See, e.g.*, Michigan 2003 Individual Income Tax Form MI-1040, *available at* http://www.michigan.gov/treasury/0,1607,7-121-1748_1904_1916-70176--,00.html (last visited September 21, 2004); Maine 2003 Individual Income Tax Form 1040S-ME, *available at* http://www.state.me.us/revenue/incomeestate/homepage.html (last visited September 21, 2004); Vermont 2003 Individual Income Tax Form IN-111, *available at* http://www.state.vt.us/tax/forms/formsindividual.htm (last visited September 21, 2004).

[33] *See* FTC Report at 27, 31-36, 38, 40.

sue for an injunction under the Twenty-first Amendment Enforcement Act, passage of which was supported by many state officials. 27 U.S.C. § 122a; *see also* FTC Report at 30. Finally, the FTC Report notes that if the state contacts the Alcohol and Tobacco Tax and Trade Bureau (TTB),[34] about the violation, TTB can revoke the shipping winery's federal permit once it determines that the shipper's violation has a "pronounced impact on the regulatory and/or criminal enforcement scheme of the state in question."[35] Without a federal permit, wineries are unable to do business anywhere in the country.

***Effect***. States that have adopted a licensing scheme report few problems with tax collection. *See* FTC Report at 38-39. These states have found that wineries generally comply voluntarily with licensing requirements, and that current means of enforcement are adequate to deal with those wineries that knowingly or unknowingly violate the law. *Id.* Furthermore, state concerns about revenue collection from interstate wine shipments are disproportionate to the relatively small amount of revenue states gain from taxes on interstate shipments of wine. Many states with reciprocity agreements – allowing direct shipments of wine to be made only between other states that offer the same reciprocal privilege – forego tax collection on interstate wine shipments altogether. *See* FTC Report at 39 n.166. There is no indication that these states have suffered serious economic consequences as a result. *Id.*

Contrary to the protestations of petitioners and *amici* otherwise, the FTC Report found that states that have instituted any or all of the less restrictive measures described above have reported few or no problems with direct shipments to minors. *See* FTC Report at 32-33.

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[34] Formerly the Federal Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF).

[35] ATF, Industry Circular No. 96-3, Direct Shipment Sales of Alcohol Beverages (Feb. 11, 1997), *available at* http://www.atf.treas.gov/pub/ind_circulars/ic_96.3.htm (last visited September 21, 2004); FTC Report at 30-31.

These states find that licensing, labeling, and delivery requirements are effective in ensuring that wine is shipped only to adults. *See id.*[36]

The proven success of the less restrictive measures reported by the FTC reveals the fallacy of Michigan's insistence that its ban on direct shipments by out-of-state wineries, but not in-state wineries, is the only way in which to protect minors, consumers, and its treasury. Michigan has the burden of demonstrating both that such a ban materially advances these goals and the unavailability of less restrictive alternatives. But the existence of many less restrictive alternatives through which Michigan can achieve all of its asserted goals demonstrates that Michigan can do neither.

## CONCLUSION

The Court should affirm the judgment in *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003).

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[36] With regard to direct shipments of wine to minors, Wisconsin reported "no complaints" and concludes "both that online sales to minors is 'not a serious problem' and that minors can obtain alcohol more easily through 'bricks and mortar' stores." FTC Report at 32, tbl. 3 (quoting from Wisconsin's response to the FTC questionnaire, located in App. B to the FTC Report). Similarly, the New Hampshire Liquor Commission reported that "there may be some instances where [shipment to minors] is occurring but we have very little evidence in this area and do not believe this is a serious problem at this time. . . . [T]he high cost of shipping and the fact that the minor has to wait for wine to arrive makes purchasing wine at a local retail[er] more desirable." *Id.* (quoting from New Hampshire's questionnaire response in App. B). The Illinois Liquor Control Commission (ILCC) stated that it

> has received no reports regarding minors obtaining wine from out-of-state shippers . . . I do not believe many minors would opt to purchase wine online due to the increased cost over brink-and-mortar [sic] establishments and due to the product itself, as my experience indicates minors would probably choose to purchase other alcoholic products over wine. I believe the direct shipment of wine to minors is . . . not a serious problem.

FTC Report at 32 (quoting Illinois's response to FTC questionnaire in App. B to FTC Report).

Respectfully submitted,

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SEPTEMBER 2004

## APPENDIX

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(11) (8)

No. 03-1116 and No. 03-1120

Supreme Court, U.S.
FILED
JUL 29 2004
OFFICE OF THE CLERK

# In The Supreme Court of the United States

JENNIFER M. GRANHOLM, ET AL.,

*Petitioners,*

v.

ELEANOR HEALD, ET AL.,

*Respondents.*

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,

*Petitioner,*

v.

ELEANOR HEALD, ET AL.,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## BRIEF OF MICHIGAN ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS, COMMITTEE FOR A CONSTRUCTIVE TOMORROW, AMERICAN TRAUMA SOCIETY, KIDS FIRST COALITION, TRAFFIC SAFETY ASSOCIATION OF MACOMB COUNTY, TRAFFIC SAFETY ASSOCIATION OF MICHIGAN, INC., NEIGHBORHOOD ACTIVISTS INTER-LINKED EMPOWERMENT MOVEMENT, AMERICAN VALUES, CONCERNED WOMEN FOR AMERICA, EAGLE FORUM, SIXTY PLUS, AND NATIONAL ASSOCIATION OF EVANGELISTS, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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## QUESTION PRESENTED

In its Order of May 24, 2004, this Court granted certiorari to consider the following question:

> Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so, violate the dormant Commerce Clause in light of Sec. 2 of the Twenty-first Amendment?

## PARTIES TO THE PROCEEDING

The Governor, the Attorney General, and the Chairperson of the Liquor Control Commission of the State of Michigan ("Michigan" or "State") were defendants-appellees below and are petitioners in No. 03-1116. The Michigan Beer & Wine Wholesalers Association ("MB&WWA"), a trade association of Michigan beer and wine wholesalers, was an intervening defendant-appellee below and is a petitioner in No. 03-1120.

Respondents in both No. 03-1116 and No. 03-1120 were plaintiffs-appellants below and are individuals Eleanor Heald; Ray Heald; John Arundel; Karen Brown; Richard Brown; Bonnie McMinn; Gregory Stein; Michelle Morlan; William Horwath; Margaret Christina; Robert Christina; Trisha Hopkins; Jim Hopkins; and winery Domaine Alfred, Inc.

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## STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The *Amici Curiae* believe this case to be of tremendous importance to the welfare of persons under the age of 21 ("minors"), because the relief requested by Respondents would greatly increase the access by minors to alcohol, which already is at crisis level, and would render state alcohol regulation unenforceable. The attendant increase in consumption of alcohol by minors would result in a corresponding increase in deaths, injuries, and other alcohol related problems to minors, their families and their victims.

The Michigan Association of Secondary School Principals is committed to the improvement of secondary education (5th through 12th grades) in the State of Michigan, and has worked with the Governor's office, the Michigan Legislature, and the Michigan Department of Education to improve education, identify obstacles, and resolve problems affecting students in middle and high schools.

The Committee for a Constructive Tomorrow is a national non-profit corporation with 40,000 supporters and is charged with promoting socially responsible consumer public policies.

The American Trauma Society is a national non-profit association with 2,000 members created to save lives through improved trauma care and injury prevention.

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[1] Pursuant to Sup. Ct. R. 37.6, *Amici* affirm that none of the *Amici* have a financial or commercial relationship with any of the parties to this case. This brief has been prepared solely by counsel for the *Amici*. No monetary contributions to the preparation and submission of this brief have been made by any person or entity other than the *Amici*, their members, or their counsel.

The Traffic Safety Association of Macomb County, Michigan, seeks to address significant issues related to highway safety, to reduce deaths, injuries, and property losses due to traffic collisions.

The Traffic Safety Association of Michigan, Inc. is a state-wide, non-profit corporation dedicated to providing traffic safety education and information for Michigan motorists and citizens.

The Neighborhood Activists Inter-Linked Empowerment Movement is a statewide Arizona non-profit organization, with 30,000 supporters dedicated to providing the public with tools to protect their neighborhoods and resolve neighborhood issues.

The Kids First Coalition is a grassroots organization of parents, grandparents, and future parents dedicated to advancing pro-child and pro-family policies and educating the country on the needs of children.

American Values is a non-profit national organization that works to educate public policy makers on issues affecting the welfare of families, which include protecting children from ready access to alcohol.

The Concerned Women for America is a national non-profit, non-partisan organization charged with promoting public policies to benefit women and families.

Eagle Forum is a national women's organization that promotes pro-family public policies.

Sixty Plus is a non-partisan national seniors' group that advocates on issues affecting the health and welfare of seniors.

National Association of Evangelicals is a non-profit association of evangelical Christian denominations, churches, organizations, institutions, and individuals that includes more than 45,000 local churches from 51 different denominations.

These diverse organizations have come together as *Amici* to oppose the efforts of Respondents to invalidate state statutes regulating the direct shipping of alcohol, which would cause a major increase in the number of alcohol-related traffic fatalities, injuries, assaults, and other crimes, especially among our youths.

## SUMMARY OF ARGUMENT

Section 2 of the Twenty-first Amendment to the United States Constitution grants the states sweeping authority to regulate alcohol trafficking in recognition of states' historical police powers, the need for state-based alcohol regulation to address local issues and concerns, and the need for an effective means of enforcement of such regulations.

Fundamental alcohol regulation requires control over what types of alcoholic products will be sold; who will be permitted to sell and to buy alcohol; and how to ensure accountability for such sales. Michigan and most other states do not permit sales from out-of-state sources to be delivered directly to in-state purchasers because no feasible and practical enforcement mechanism can provide fundamental control over such sales.

All 50 states prohibit sales of alcohol to minors. If the states cannot control direct shipping, the states cannot protect against illegal sales to minors.

Pointing to a single element of a complex regulatory system that superficially appears to grant in-state wineries a "preference" of local delivery not granted to out-of-state wineries, Respondents seek to eliminate statutes prohibiting direct shipping.

In doing so, Respondents ignore the critical differences between in-state and out-of-state wineries. The state imposes a heavy burden of licensing, regulation, and enforcement on in-state wineries, and can impose serious penalties for non-compliance, including license revocation. The same level of regulation and enforcement cannot realistically be imposed on out-of-state wineries.

Moreover, the claim of disparate treatment of in-state and out-of-state wineries is a ruse. Respondents do not ask for the in-state "preference" to be struck down; their sole purpose is to eliminate state regulation of shipments of alcohol from out-of-state.

Also of concern are the ramifications of the Court's decision beyond the confines of the case. Although the certified question mentions only wineries, striking the prohibition against direct shipping would permit direct shipping from not only the 3,000 United States wineries, but also the thousands of other wineries worldwide. Moreover, producers of beer and spirits also would be able to ship their products, as would hundreds of thousands of out-of-state retailers.

It is this threat of deregulation, the concomitant expansion of alcohol access by underage persons, and the catastrophic consequences of this increased access that join the diverse *Amici* in this brief.

## ARGUMENT

## THE IMPORTATION AND SALE OF ALCOHOLIC BEVERAGES MUST BE CLOSELY REGULATED BY THE STATES TO PROTECT AGAINST UNFETTERED ACCESS TO ALCOHOL BY MINORS.

### A. Alcohol Trafficking Historically Has Been Heavily Regulated By The States.

Because of its potential for abuse, the importance of an enforceable system of alcohol regulation has long been recognized. Trafficking in alcohol has been the subject of two Constitutional amendments,[2] as well as federal legislation clarifying the nearly absolute authority of the states over alcohol trafficking.[3] No other consumer product has received the same level of attention. As the Seventh Circuit noted in *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000), *cert. denied, sub nom., Bridenbaugh v. Carter*, 532 U.S. 1002 (2001), a state may "control alcohol in ways that it cannot control cheese."

### B. Preventing Underage Alcohol Access And Consumption Is The Public Policy Of All 50 States, And Is Fully Supported By The United States Government.

Particular concerns about the consequences of youth drinking resulted in the enactment of the National Minimum

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[2] U.S. Const. amend. XVIII prohibited all manufacture and sale of alcohol; the Twenty-first Amendment repealed the Eighteenth Amendment, but in doing so, through § 2, expressly placed authority to control alcohol with the states. A proposed § 3 to the Twenty-first Amendment would have provided dual jurisdiction over alcohol regulation with the federal government, but was defeated.

[3] Wilson Act, 27 U.S.C. § 121; Webb-Kenyon Act, 27 U.S.C. § 122.

Drinking Age Act[4] in 1984, which threatened the loss of certain federal funding, prompted all of the states that had not yet done so, to set a minimum age of 21 for drinking alcohol. This Act has been credited with saving more than 20,000 young lives in the 20 years since enactment.[5]

In spite of these gains, underage access to alcohol and the related loss of lives, injuries, and other societal costs resulting from underage drinking remain a serious problem. On July 21, 2004, the STOP Underage Drinking Act[6] was introduced in the House of Representatives.

Among the Congressional Findings of the Act are:

> (1) Drinking alcohol under the age of 21 is illegal in each of the 50 States and the District of Columbia. Enforcement of current laws and regulations in States and communities, *such as minimum age drinking* laws, zero tolerance laws, and *laws and regulations which restrict availability of alcohol*, must supplement other efforts to reduce underage drinking.
>
> (2) Data collected annually by the Department of Health and Human Services shows that alcohol is the most heavily used drug by children in the United States, and that –
>
> > (A) more youths consume alcoholic beverages than use tobacco products or illegal drugs;

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[4] 23 U.S.C. § 158.

[5] Mothers Against Drunk Driving, http://www.madd.org/aboutus/0,1056,1986,00.html (last visited July 24, 2004).

[6] H.R. 4888, 108th Cong. (2004).

(B) by the end of the eighth grade, 45.6 percent of children have engaged in alcohol use, and by the end of high school, 76.6 percent have done so; and

(C) the annual societal cost of underage drinking is estimated at $53 to $58 billion.

(3) Data collected by the Department of Health and Human Services and the Department of Transportation indicate that alcohol use by youth has many negative consequences, such as immediate risk from acute impairment; traffic fatalities; violence; suicide; and unprotected sex.

(4) Research confirms that the harm caused by underage drinking lasts beyond the underage years. Compared to persons who wait until age 21 or older to start drinking, those who start to drink before age 14 are, as adults, four times more likely to become alcohol dependent; seven times more likely to be in a motor vehicle crash because of drinking; and more likely to suffer mental and physical damage from alcohol abuse.

(5) Alcohol abuse creates long-term risk developmentally and is associated with negative physical impacts on the brain.

(6) Research indicates that *adults greatly underestimate the extent of alcohol use by youths*, its negative consequences, and its use by their own children. The IOM report concluded that underage drinking cannot be successfully addressed by focusing on youth alone. Ultimately, adults are responsible for young people obtaining alcohol by selling, providing, or otherwise making it available to them.

* * *

(8) *A significant percentage of the total alcohol consumption in the United States each year is by underage youth. The Substance Abuse and Mental Health Services Administration reports that the percentage is over 11 percent.*

* * *

(14) College and university presidents have cited *alcohol abuse as the number one health problem* on college and university campuses.

(15) According to the National Institute on Alcohol Abuse and Alcoholism, two of five college students are binge drinkers; 1,400 college students die each year from alcohol-related injuries, a majority of which involve motor vehicle crashes; more than 70,000 students are victims of alcohol-related sexual assault; and 500,000 students are injured under the influence of alcohol each year.

* * *

(18) According to the Government Accounting Office ('GAO'), the Federal Government spends $1.8 billion annually to combat youth drug use and $71 million to prevent underage alcohol use. (emphasis added)

H.R. 4888, § 101 further provides that:

It is the sense of the Congress that:

(1) A multi-faceted effort is needed to more successfully address the problem of underage drinking in the United States. . . .

(2) States and communities, including colleges and universities, are encouraged to adopt comprehensive prevention approaches, including –

* * *

(C) consistent policy enforcement; and

(D) environmental changes that limit underage access to alcohol.

(3) Public health and consumer groups have played an important role in drawing the Nation's attention to the health crisis of underage drinking. Working at the Federal, State, and community levels, and motivated by grass-roots support, they have initiated effective prevention programs that have made significant progress in the battle against underage drinking.

Finally, H. R. 4888 requires the Secretary of Health and Human Services to "annually issue a 'report card' to accurately reflect the performance of each state in enacting, enforcing, and creating laws, regulations, and programs to prevent or reduce underage drinking."[7]

The measures upon which the states will be rated include:

(A) *The degree of strictness of the minimum drinking age laws* and dram shop liability statutes in each State.

(B) The number of compliance checks conducted within alcohol retail outlets measured against the number of total alcohol retail outlets in each State, and the results of such checks.

(C) Whether or not the State mandates or otherwise provides training on the proper selling and serving of alcohol for all sellers and servers of alcohol as a condition of employment.

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[7] H.R. 4888, § 202, 108th Cong. (2004).

> (D) Whether or not the State *has policies and regulations with regard to Internet sales and home delivery of alcoholic beverages.*[8] (emphasis added)

Thus, it is apparent that although the Respondents may be naïve or disingenuous enough to assert that deregulation of alcohol shipping will have no impact on underage drinking, Congress is not.

### C. Direct Shipping Of Alcohol Will Increase Minors' Access To Alcohol.

Respondents disparage the notion that directly shipping alcohol from out-of-state to private residences will increase underage drinking. Variously, Respondents have contended that no evidence exists that minors are purchasing alcohol from direct shippers; minors do not have the monetary resources or desire to buy costly, upscale wines; minors seeking to purchase alcohol will obtain the alcohol only from sources that provide them with immediate access; the ease with which minors can obtain access to alcohol from in-state party stores and bars make it unlikely that they will seek out alternative sources; and age verification by delivery personnel is sufficient to ensure that minors do not receive shipments of alcohol.

Real world experiences refute these claims.

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[8] *Id.*

**1. As local law enforcement efforts reduce the opportunities to obtain alcohol from in-state licensed retailers, minors will seek alternative ways to obtain alcohol.**

Michigan, among other states, has substantially increased enforcement efforts to reduce in-state sales of alcohol to minors. Although the problem is far from being eliminated, significant reductions in such sales have been achieved. Michigan now requires alcohol management training for new licensees as a condition of licensing.[9] Underage drivers' licenses have been modified to make identification easier, most recently by issuing vertical licenses to minors, and horizontal licenses to those over 21, and by providing the date upon which the driver will turn 21.[10] Licenses now have holographic images and data strips to make forgery more difficult.

For obvious reasons, neither minors illegally purchasing alcohol nor the retailers selling to them self-report their crimes. Thus, the primary way to assess the effectiveness of deterrent measures in-state has been through controlled buy investigations ("stings") in which a minor under the supervision of law enforcement attempts to purchase alcohol. Other than these stings, illegal alcohol purchases and consumption typically come to light only when law enforcement officers are called to the site of a traffic crash or investigate rapes, assaults, and other alcohol related offenses.

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[9] MCL 436.1906; 1979 AC, R. 436.1060.

[10] http://www.michigan.gov/sos/0,1607,7-127--70561--,00.html (last visited July 23, 2004).

Detecting illegal purchases made by a minor from an out-of-state seller over the internet, by phone, or through catalog sales, where the alcohol is then delivered to the minor's doorstep, is more difficult yet. The only reliable way to measure the ease of access is through stings involving minors placing orders to determine whether the sellers require proper age verification at the time of the orders and first determine whether delivery companies verify that the recipients are over 21.

Respondents have argued that only minors participating in the stings are purchasing alcohol from out-of-state, that no evidence exists outside of the stings. This argument is identical to the argument proffered by in-state retailers when in-state stings were first implemented. The fundamental flaw in this argument is that neither retailers nor minors voluntarily turn themselves in for prosecution following a sale. Absent decoy stings, sales to minors typically are identified only when the minor is involved in an alcohol related offense. Accordingly, direct evidence of sales to minors outside of stings is very limited. The best evidence that minors have easy access to alcohol from remote sellers continues to be the result of decoy stings.

A number of such stings have shown that it is all too easy for minors to purchase alcohol for direct shipment from out-of-state.

In mid-1999, the Michigan Attorney General and the Liquor Control Commission conducted a series of stings, which revealed that most alcohol sellers were far more concerned about the validity of the credit card number

than the age of the purchaser.[11] About one in three sites contacted agreed to sell alcohol to the minor purchaser with no more age verification than a "click" of the mouse. United Parcel Service personnel delivered the purchases without verifying the age of the minor recipient. Since that time, Michigan has intercepted and seized over a thousand bottles of illegally shipped wine, beer, and spirits. Nearly 2/3 of the shipments were from alcohol retailers, *not* wineries.[12]

In the fall of 2003, students enrolled in a Public Health class at the University of Tennessee teamed with the Knox County Sheriff's Department and the Knoxville chapter of Mothers Against Drunk Driving to determine whether alcohol could be obtained by a minor over the internet. The students successfully made and had delivered purchases of alcohol from out-of-state retailers without age verification.[13]

More recently, in Massachusetts, stings resulted in multiple sales and delivery of alcohol to underage buyers making their purchases over the internet.[14]

Where enforcement efforts are successfully reducing the number of sales to minors at in-state licensed establishments, it should be expected that a greater percentage of remote sellers would sell to minors than would in-state retailers.

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[11] http://www.ag.state.mi.us/press_release/archive/pr10163.htm (last visited July 25, 2004).

[12] *Id.*

[13] WBIR-TV (NBC), Knoxville, TN, reported on November 12, 2003.

[14] http://www.ago.state.ma.us/sp.cfm?pageid=986&id=1241 (last visited 13, 20 July 23, 2004).

First, a remote sale does not involve a face-to-face transaction. In-state retailers approached by a minor to purchase alcohol have an opportunity to observe the purchaser directly, to assess nervousness and other mannerisms that indicate the person may not be of legal age to purchase, and to closely scrutinize a government-issued picture identification. Michigan requires "diligent inquiry" to verify age, which is defined as, "at least an examination of an official Michigan operator's or chauffeur's license, an official Michigan personal identification card, or any other bona fide picture identification which establishes the identity and age of the person."[15] This requirement simply cannot be met by a "click" of the mouse or a faxed (and easily altered) copy of a license.

Second, in-state licensed wineries and retailers risk their state liquor license – their very livelihood – if they sell to minors. Out-of-state wineries and retailers have little to lose, since, in the rare event that the illegal sale is identified, their licenses are not at risk and out-of-state prosecutions are exceptionally difficult and prohibitively costly to pursue.

No system for verification of age has been identified that can adequately protect against alcohol purchases by minors from out-of-state sellers.

### 2. Underage Buyers have incentive and financial resources to purchase alcohol for direct shipment.

Respondents have suggested that minors will not buy costly upscale wines. This premise presumes that minors

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[15] MCL 436.1701(10)(b).

have little discretionary money and that they have no interest in fine wines. The first presumption is false and the second presumption is irrelevant.

The discretionary income of minors is not perceived as minimal by those who market to this demographic. Studies by Teen Research Unlimited, a market-research firm that focuses on the teen market, estimated that teens in the United States from ages 12 to 19 spent $175 billion in 2003.[16] The average high school teen spends $66.00 weekly.[17]

Moreover, the use of credit cards by teenagers has mushroomed. Approximately 1 in 5 teens ages 12 to 19 have and use a credit card.[18] Nearly 80% of teens ages 18 to 20 years have their own credit card.[19] Persons entering college are offered an average of 8 credit cards the first week of school.[20]

And teens do use their credit cards, often to their detriment. Undergraduate college students carry an average of three credit cards each,[21] and 20% of those

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[16] http://www.teenresearch.com/PRview.cfm?edit_id=168 (last visited July 23, 2004).

[17] http://cardweb.com/cardlearn/faqs/2003/november/21.xcml (last visited July 17, 2004).

[18] Young Americans Center for Financial Education, http://www.yacenter.org/index.cfm?fuseAction=financialLiteracyStatistics (last visited July 17, 2004).

[19] http://cardweb.com/cardlearn/faqs/2002/sep/24.xcml (last visited July 17, 2004).

[20] Young Americans Center for Financial Education, http://www.yacenter.org/index.cfm?fuseAction=financialLiteracyStatistics (last visited July 17, 2004).

[21] Louisiana State University Agricultural Center, Youth Financial Literacy Statistics, http://www.lsu.edu (last visited July 17, 2004).

students who carry balances on their cards have debts of more than $10,000.[22] University administrators state that they lose more students to credit card debt than to academic failure.[23]

The second presumption, that minors have no interest in fine wines, is irrelevant, since wineries and retailers do not limit their offerings to high end wines for those with sophisticated palates. Although Respondents continue to characterize this case as limited to wine connoisseurs and enthusiasts seeking rare fine wines, however those are defined in fact, the statutes they seek to invalidate are not so limited. The alcohol controlled by the state's three-tier system include wine coolers, beer, rums, tequilas, flavored vodkas, and other similar products favored by young drinkers. 35% of all wine coolers sold in the United States are consumed by junior high, middle school, and high school students.[24] The ability to obtain these products without a face-to-face purchase is particularly attractive to the younger and more youthful appearing teens.

Respondents also have contended that wineries do not *market* to youthful drinkers. Again, this case is not exclusively about wineries. The statutes in question regulate beer and spirits sales as well. Moreover, even if the case were limited to wine, many wine sites either are directed at youth, or contain links to youth oriented wine sites.

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[22] Virginia Credit Union League, citing statistics obtained from the American Bankruptcy Institute, the Federal Reserve, and the National Endowment for Financial Education, http://www.vacul.org/fin_lit/stats.htm (last visited July 17, 2004).

[23] http://www.louisiana.tomorrowsmoney.org/information.cfm/youth/eng (last visited July 23, 2004).

[24] www.wirthlin.com.

Sites such as Wine X Wired,[25] which features "Wine Bitch," "X-Rated Wines," "Winebrats," "G-Spot," "WineRave," and "Sex, Wine & Rock N' Roll" clearly are aimed toward youth.

One of the first studies to explore Internet marketing of alcohol and tobacco to minors was conducted by the Center for Media Education (CME):

> The study found that alcohol and tobacco companies are using the online media to advertise and promote their products, through a variety of marketing techniques that capitalize on the medium's strong and unique attraction for young people.[26]

In December 1998, the CME published an update to the original study.[27] This study examined 77 beer, wine, and spirits Internet sites, and concluded that 62% of the sites included elements appealing to youth. The study discussed the marketing techniques:

> The sites that appear to appeal to youth often strive to create a community of brand-loyal enthusiasts, a place where lonely teens can talk, find peers and support for risky activities like binge drinking. Known among marketers as relational advertising, this effort to build a relationship between the user and the product is the dominant trend in marketing on the Web and is already heavily exploited by the alcohol industry.

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[25] www.winexwired.com/toc.htm (last visited July 24, 2004).

[26] *Alcohol and Tobacco on the Web: New Threats to Youth*, March 1997.

[27] *Alcohol Advertising Targeted at Youth on the Internet: An Update*, December 1998.

It is thus apparent that internet alcohol websites do market to teens, and teens have the ability and interest in purchasing online.

### 3. Minors are willing to purchase alcohol from direct shippers if their age is less likely to be verified and they are less likely to be caught, even if the purchase entails a slight delay until receipt.

Respondents also have contended that minors want immediate access to alcohol, and won't wait for shipment from a remote seller. The Wirthland Worldwide study of college students[28] conducted for Americans for Responsible Access for Alcohol[29] suggests otherwise, finding that 17,609 students in the survey reported having purchased beer, wine, or liquor over the internet, by toll-free phone order, or by mail-order catalog. Obviously, a delay in receiving the alcohol did not stop these sales. The Wirthland study also found that 80% of the students surveyed said their peers are likely to purchase alcohol online if no age verification is required.

Moreover, the delay between ordering and delivery of alcoholic products can be minimal. Most alcohol websites offer a variety of delivery options, ranging from UPS Ground to FedEx Preferred Overnight, the latter of which

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[28] www.wirthlin.com.

[29] ARAA's members and supporters include, *inter alia*, the Virginia Attorney General, Students Against Destructive Decisions (SADD), the National Association of Governors' Highway Safety Representatives, the American Academy of Pediatrics, the Virginia Alcohol Control Board, the American Council of Alcoholism, and the National Transportation Safety Board.

guarantees delivery by 10:30 a.m. the morning following the order.[30]

Thus, a minor wishing to purchase a case of grain alcohol from Randall's Wines and Spirits (www.internet wines.com)[31] for a Friday "party punch" could order it on the preceding Monday for regular delivery, or he could wait to order it until late Thursday and still have it arrive on Friday morning by adding only $20 more to the shipment cost.

### 4. Common carrier delivery personnel do not properly verify the age of the person accepting shipments.

Respondents also suggest that the burden of age verification should be with delivery personnel who can be trained to properly validate age. The stings in Michigan, Tennessee, and Massachusetts showed that common carrier delivery personnel were *not* effective at verifying that the recipients of packages containing alcohol were at least 21 years old.

In the Michigan stings discussed previously, UPS delivered the illegal shipments without proper age verification of the recipients. The sting investigations by the

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[30] See, *e.g.*, Prime Wines, http://www.primewines.com/content_shipping.asp ("Most orders are delivered within 48 hours of confirmation. . . . Express Delivery is available"), Internet Wines and Spirits, http://www.internetwines.com/shippingrates.html ("In most cases, in-stock items will ship same-day when ordered before 8:00 am central time. Overnight and 2nd Day orders placed after 8:00 am central time will be shipped the next business day.") (Both sites last visited July 24, 2004).

[31] www.internetwines.com (last visited July 24, 2004).

University of Tennessee[32] and the state of Massachusetts[33] also found that delivery personnel failed to verify age, even where the packages identified the contents as alcohol and had labels stating that age verification was necessary.

Common carrier delivery personnel are trained to deliver *packages* – that is the business of and source of revenue for the delivery company. Delivery personnel, whose mission is to deliver as many packages in as short a time as possible, are only hampered in achieving their goal by requirements of age verification.

The common carrier and its personnel make money from the delivery of packages, not from selling alcohol. Demanding that delivery personnel conduct ID checks is not an effective and reliable method of verifying age.

## D. Alcohol Regulation Is Not Possible Without Enforcement Capability.

Enforcement efforts against out-of-state entities are prohibitively difficult and costly. If direct shipping is permitted, out-of-state sellers simply cannot be subject to the same standards and enforcement as in-state retailers.

In-state retailers and wineries are subject to rigorous investigation in order to become licensed, which requires, among other things, extensive disclosure of financial documents, on-site inspections of proposed license premises, and policy background checks.[34] Once licensed, they

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[32] WBIR-TV (NBC), Knoxville, TN; reported on November 12, 2003.

[33] http://www.ago.state.ma.us/sp.cfm?pageid=986&id=1241 (last visited July 23, 2004).

[34] MCL 436.1101, et seq.; 1979 AC, R. 436.1101-436.1531.

must comply with a multitude of statutory requirements and rules designed to protect the consuming public. Retailers bear the burden of ensuring that sales are not made to minors or intoxicated persons; that sales are made only during hours authorized by statute; that sales are not made in violation of local option laws; that only safe, approved products are sold; that spirit sales are made in accordance with state-mandated price controls; and that appropriate taxes are collected and remitted to the state.[35] Retailers are held responsible for improper or illegal sales with penalties ranging from fines to suspension or revocation of their liquor licenses.[36] Dram-shop laws place liability on retailers for injuries and deaths resulting from sales to minors or visibly intoxicated individuals.[37]

These stringent requirements protect consumers from unlawful sales by requiring that alcoholic beverages be sold and distributed to consumers only by persons who are responsible and can be held accountable. In-state retail licensees are accountable to and reachable by the State, because non-compliance with the law may subject them to fines, suspension, or revocation of their liquor licenses and even criminal prosecution.

A decoy sting on an in-state retailer is simple: The minor attempts to make a purchase with cash furnished by law enforcement and immediately is either sold or turned away. A decoy team can make many stops in a single outing.

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[35] *Id.*

[36] MCL 436.1901, et seq.

[37] MCL 436.1801.

A decoy sting on an out-of-state retailer is more costly and time-consuming: The minor must have a credit card in his own name and must be present for delivery. Following such a sale and delivery, the actual seller must be identified for further enforcement effort.

Establishing the true identity of the seller from the Internet website name or assumed name is frequently difficult. The seller's website often provides few clues to the name of the seller or its location. As an example, the Internet site www.internetwines.com is operated by Randall's Wine & Spirits, and "Out of Africa" is the assumed name for S.A. Wines, Inc., a California company specializing in selling wines from Africa and South America. Further, once located, out-of-state sellers typically dispute jurisdiction, refuse service, or ignore communications sent to them. There is no state-issued license to fine or revoke, and the seller assumes little risk by selling in a manner that would never be permitted for in-state licensees.

Applying and enforcing the state's liquor laws "equally" on in-state and out-of-state wineries and retailers, so casually suggested by the Respondents as a panacea, is based on a superficial, simplistic, and flawed understanding of liquor control regulation and enforcement.

There is not a state in the union that could afford to fund regulation of the hundreds of thousands of out-of-state retailers and wineries the same way it regulates its in-state retailers and wineries.

### E. The Ramifications Of The Court's Decision In This Case Extend Well Beyond Wine And Wineries.

Because wineries selling and shipping their own products are acting as retailers for their wines, little distinction exists between these wineries and retailers who want to ship alcoholic beverages produced by others. Literally hundreds of thousands of alcohol retailers in the United States are affected in the same way as the wineries by the direct shipping laws. Add to these the breweries, distilleries, and retailers from around the world, and the numbers become mind-boggling.

The burden placed on a state to apply the level of oversight, investigation, and enforcement it imposes on in-state wineries and retailers is impossible to impose on virtually an unlimited number of out-of-state alcohol sellers.

As the Court is well aware, laws and regulations are worthless without a real ability to enforce them. Permitting direct shipments would render Michigan's regulatory system unenforceable against all out-of-state sellers.

## CONCLUSION

Alcohol regulation and control continues to be a necessary adjunct to alcohol sale and distribution, because alcohol *is* different from most other products and because of the damage that results from its overuse and abuse. Every state has committed to protection of our minors, yet minors will be placed at the greatest risk of injury if state laws prohibiting direct shipping are stricken.

Accordingly, *Amici* urge the Court to enforce states' rights under the Twenty-first Amendment to the Constitution, and reverse the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

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JENNIFER M. GRANHOLM, GOVERNOR OF MICHIGAN, *et al.*,
*Petitioners,*

v.

ELEANOR HEALD, *et al.*,
*Respondents.*

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MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,
*Petitioner,*

v.

ELEANOR HEALD, *et al.*,
*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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**BRIEF OF *AMICI CURIAE* NAPA VALLEY VINTNERS, SONOMA COUNTY WINERIES ASSOCIATION, MONTEREY COUNTY VINTNERS AND GROWERS ASSOCIATION, EL DORADO WINERY ASSOCIATION, AMADOR VINTNERS' ASSOCIATION, TEMECULA VALLEY WINEGROWERS ASSOCIATION, AND SANTA CRUZ MOUNTAINS WINEGROWERS' ASSOCIATION IN SUPPORT OF RESPONDENTS**

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## QUESTION PRESENTED

Whether a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violates the dormant Commerce Clause in light of Section 2 of the 21st Amendment?

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## INTEREST OF *AMICI CURIAE*[1]

*Amici* are organizations whose members are vintners and winegrowers located throughout the State of California. California is one of the oldest wine-growing regions in the country. Its vintners have long sold wine not only to consumers in California but nationwide. For example, at issue in *Scott* v. *Donald*, 165 U.S. 58 (1897), one of the key nineteenth century Commerce Clause discrimination cases discussed in some detail below, was the ability of vintners in California to sell their wines in South Carolina through the state dispensary on terms equal to those of South Carolina's vintners. Although much has happened since those early battles over 100 years ago, California vintners continue to have a strong interest in ensuring that the Commerce Clause affords them non-discriminatory access to consumers throughout the United States.

*Amici* are described in the Appendix and include Napa Valley Vintners, Sonoma County Wineries Association, Monterey County Vintners and Growers Association, El Dorado Winery Association, Amador Vintners' Association, Temecula Valley Winegrowers Association, and Santa Cruz Mountains Winegrowers' Association.

## SUMMARY OF ARGUMENT

The Court has recognized that Section 2 of the Twenty-first Amendment effectively enshrined in the Constitution the powers granted the States by the Webb-Kenyon and Wilson Acts. See *Craig* v. *Boren*, 429 U.S. 190, 206 (1976). This Court has never had occasion to review in any detail, however, the implications of those Acts, and of the decisions of this Court that prompted and construed them, to ascertain

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[1] Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation of this brief. All parties have consented to the filing of this brief, and copies of the consents have been filed with the Clerk.

the scope of Section 2. Such a review is particularly appropriate for this case, for it refutes conclusively the notion that Section 2 repealed the anti-discrimination principle of the Commerce Clause. U.S. Const. art. I, § 8.

Instead, the history of Section 2 reveals that Congress was concerned with an entirely different Commerce Clause problem, the "immunity" from burdensome state laws that was afforded to liquor once it was placed in interstate commerce. That immunity meant that States with laws that prohibited the manufacture and sale of domestically produced liquor could not apply those laws even-handedly to imported liquor; they could neither intercept shipments of such liquor into their state nor bar its sale. The Twenty-first amendment eliminated that immunity, but had no effect whatsoever upon the longstanding prohibition against protectionist state laws that discriminated in favor of in-state producers.

Prior to the enactment of the Webb-Kenyon Act, this Court repeatedly struck down state liquor laws under the Commerce Clause. In one line of cases, the Court declared unconstitutional state laws that imposed discriminatory taxes on imported liquor while exempting domestic liquor, as well as other laws that discriminated against imported liquor. See *Scott* v. *Donald*, 165 U.S. 58 (1897); *Walling* v. *Michigan*, 116 U.S. 446 (1886); *Tiernan* v. *Rinker*, 102 U.S. 123 (1880).

In a second line of cases, the Court struck down state laws that, although non-discriminatory, imposed direct and impermissible burdens on interstate commerce in liquor. See *Rhodes* v. *Iowa*, 170 U.S. 412 (1898); *Leisy* v. *Hardin*, 135 U.S. 100 (1890); *Bowman* v. *Chi. & N.W. Ry.*, 125 U.S. 465 (1888). The Court in *Leisy* explained that shipments of liquor across state lines are in interstate commerce, and hence are "immune" from state regulation until after the liquor has been sold in its original package, even though the State may prohibit the sale of domestic liquor. 135 U.S. at 124.

In response to the holding in *Leisy*, Congress passed the Wilson Act of 1890. That Act did not empower a State to discriminate in favor of its local liquor industry. *Scott*, 165 U.S. at 100-01. Instead, the Wilson Act allowed States to prohibit the sale of imported liquor, regardless of whether it was in its original package. *In re Rahrer*, 140 U.S. 545, 564 (1891). Nonetheless, the Court held that the immunity of liquor in interstate commerce persisted under the Wilson Act, and thus States could not prohibit importation of liquor for personal use. *Rhodes*, 170 U.S. at 422-23.

To close the loophole opened by *Rhodes*, Congress passed the Webb-Kenyon Act. That Act gave States the power to block the importation of liquor for use in violation of state law, *Clark Distilling Co.* v. *Western Maryland Railway*, 242 U.S. 311, 324 (1917), but it did not empower them to discriminate. The effect of the Webb-Kenyon Act on the holdings in *Rhodes*, *Leisy* and *Bowman*, regarding the immunity of imported liquor from state regulation, was mentioned repeatedly in the congressional debates on the Act. Conversely, there is nothing in the language, purpose or history of the Webb-Kenyon Act that suggests that it was designed to change the rule against discriminatory regulation in *Scott*, *Walling* and *Tiernan*.

The history of the Twenty-first Amendment thus demonstrates that Section 2 of the Amendment was intended simply to "constitutionaliz[e] the Commerce Clause framework established under [the Webb-Kenyon and Wilson Acts]" after the repeal of Prohibition. *Craig*, 429 U.S. at 206. The Senate debates demonstrate that Section 2 was needed to secure the Webb-Kenyon Act against both repeal by Congress and constitutional attack. The debates make clear that the purpose and effect of Section 2 is to lift the "immunity" from state regulation that otherwise would attach to liquor in interstate commerce so that liquor could be intercepted before it reached the "consignee." Section 2 thus was coincident with, and did not extend, the Webb-Kenyon Act. There was

no suggestion that Section 2 was needed to permit States to discriminate. Had Section 2 been intended to change the longstanding rule against discriminatory state regulation of liquor, someone would have mentioned it explicitly.

Finally, the history and purpose of Section 2 are consistent with the Court's post-Amendment caselaw. In recent decades, the Court has recognized that a broad (and as shown here, wholly ahistorical) reading of the Twenty-first Amendment that would obliterate the anti-discrimination principle of the Commerce Clause is unwarranted. But even the Court's first decision construing the Twenty-first Amendment, *State Board of Equalization* v. *Young's Market Co.*, 299 U.S. 59 (1936), is consistent with the history of the Amendment. Despite the breadth of certain language in its opinion, the Court in *Young's Market* had no occasion to determine whether the Twenty-first Amendment overturned the Court's long line of cases declaring unconstitutional discriminatory state liquor laws because the Court determined that the case simply did "not present a question of discrimination prohibited by the commerce clause." *Id.* at 62. *Young's Market* involved only a fee that imposed a "direct burden" on interstate commerce, and thus the holding there was fully consistent with the scope of Section 2, which ensures that States may enforce even-handed laws against liquor products in interstate commerce without facing claims that those products are immune from regulation under the Commerce Clause.

## ARGUMENT

### I. THE WILSON AND WEBB-KENYON ACTS WITHDREW THE IMMUNITY FROM STATE REGULATION AFFORDED LIQUOR IN INTER-STATE COMMERCE, BUT DID NOT GRANT STATES POWER TO DISCRIMINATE AGAINST IMPORTED LIQUOR.

#### A. Before Prohibition, The Court Invalidated Both Discriminatory And Non-Discriminatory Liquor Laws Under The Commerce Clause.

By the late nineteenth century, the temperance movement was in full swing. A number of States had passed prohibition laws that outlawed the manufacture or sale of intoxicating liquors. Other States that had not yet become completely "dry" imposed substantial restrictions on the manufacture or sale of intoxicating liquors. See generally J.G. Woolley & W.E. Johnson, *Temperance Progress in the Century* 142-51, 177-78, 343-45 (1903) (discussing state liquor laws from the 1860s through the turn of the century). This Court had recognized the States' broad police powers to regulate, and even prohibit altogether, the manufacture or sale of intoxicating liquors within their borders. See *Mugler* v. *Kansas*, 123 U.S. 623, 661-62 (1887). Nonetheless, the Court repeatedly held that the Commerce Clause restricted the States' power over imported liquor.

In one line of cases, the Court declared unconstitutional state regulations that discriminated against imported liquor. In *Tiernan*, the Court considered a Texas statute that imposed an annual tax on persons who sold "spirituous, vinous, malt, and other intoxicating liquors," but exempted those persons who sold only wine or beer manufactured in Texas. 102 U.S. at 127-28. The Court explained that "commerce . . . between the States . . . is of national importance and admits and requires uniformity of regulation; [and] that the object of vesting this power in the general government was to insure

this uniformity against discriminating State legislation." *Id.* at 126. The Court determined that the Texas law was "inoperative, so far as it makes a discrimination against wines and beer imported from other States." *Id.* at 127. As the Court explained, a tax "cannot be exacted for the sale of beer and wines when [of] foreign manufacture, if not exacted from their sale when of home manufacture." *Id.*[2]

Six years later, in *Walling* v. *Michigan*, 116 U.S. 446 (1886), the Court struck down a Michigan tax that discriminated against imported liquor while exempting locally produced liquor. The Court in *Walling* summed up the governing rule:

> A discriminating tax imposed by a State operating to the disadvantage of the products of other States when introduced into the first mentioned State, is, in effect, a regulation in restraint of commerce among the States, and as such is a usurpation of the power conferred by the Constitution upon the Congress of the United States.

*Id.* at 455.

In a second line of cases, the Court struck down non-discriminatory liquor regulations that, although they purported to treat imported and domestic liquor the same, nonetheless imposed direct and impermissible burdens on interstate commerce. In *Bowman*, the Court considered an Iowa law that (for all but medicinal, sacramental, or other limited purposes) prohibited the manufacture and sale of intoxicating liquors in the State. To enforce this ban, the Iowa law also prohibited common carriers from transporting

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[2] Because the plaintiffs sold *liquors*, which were not subject to the discriminatory tax exemption that applied to sellers of only wines and beer, the Court affirmed the dismissal of the plaintiffs' suit seeking to enjoin enforcement of the tax. The Court explained, "There is no reason why [plaintiffs] should be exempted from the tax when selling brandies and whiskies and other alcoholic drinks . . . because they could not be thus taxed if their occupation was limited to the sale of wines and beer." *Tiernan*, 102 U.S. at 128.

liquor into Iowa from another State without prior certification that the recipient of the liquor—the "consignee"—was authorized by Iowa to sell the liquor. Although the Court did not view the restriction on transportation of imported liquor as discriminating against imported liquor, the Court nonetheless struck down the law as burdening interstate commerce. 125 U.S. at 500.

The Court began by noting that in matters involving commerce with foreign countries or between the States, Congress's "non-action . . . with respect to any particular commodity . . . is a declaration . . . that the commerce in that commodity . . . shall be free." *Id.* at 485. Although Iowa could "prohibit all domestic commerce in [intoxicating liquors] between its own inhabitants," Iowa "cannot, without the consent of Congress, express or implied, regulate commerce between its people and those of the other States of the Union in order to effect its end, however desirable such regulation might be." *Id.* at 493.

The Court expressly rejected the argument that only regulations that discriminate against the persons or products of other States run afoul of the Commerce Clause. The Court explained that nondiscriminatory regulations "directly affecting interstate commerce" likewise are prohibited. *Id.* at 496-97. The Court acknowledged the State's concern that a domestic prohibition against the manufacture and sale of intoxicating liquor could not be made effective unless it could be enforced against imported liquor. The Court, however, held that "the power to regulate or forbid the sale of a commodity, after it has been brought into the State, does not carry with it the right and power to prevent its introduction by transportation from another State." *Id.* at 500.

The Court left open whether the State could prohibit the sale of imported liquor after it arrived in the State. In his dissent, however, Justice Harlan predicted that if the Constitution conferred the right to import liquor, it also would confer the right to sell the liquor in its "original package[],"

and States would find it impossible to enforce even non-discriminatory laws against the sale of liquor. *Id.* at 514 (Harlan, J., dissenting). A person who wanted to sell liquors in Iowa "need only arrange to have them delivered to him from some point in another State, in packages of varying sizes, as may suit customers. Or, he may erect his . . . warehouse, just across the Iowa line . . . and thence . . . transport liquors into Iowa, in original packages." *Id.* at 514-15 (Harlan, J., dissenting).

The Court addressed the question left open in *Bowman* in *Leisy*, and proved Justice Harlan prescient. It held that Iowa could not prohibit the sale by a "consignee" of imported liquor in the original package. 135 U.S. at 124. The Court explained that under *Bowman*, liquor moving in interstate commerce is immune from state regulation. *Id.* at 119. It "is only after the importation is completed, and the property imported has mingled with and become a part of the general property of the State, that its regulations can act upon it." *Id.* Because such mingling does not occur until the imported property is sold, the immunity from state regulation extends through the sale of the imported liquor in its original package, meaning that the importer not only had the right to import liquor into Iowa, he also "had the right to sell it." *Id.* at 124.

Following *Leisy*, the broad immunity from state regulation afforded *imported* liquor under the Commerce Clause placed Iowa in an untenable position. Iowa was able to prohibit the manufacture and sale of *domestic* liquor, but unable to stop sales of imported liquor. To achieve their temperance goals, Iowa and other "dry" States needed authority to treat domestic and imported liquor the same.

### B. The Wilson Act Partially Lifted The Immunity Afforded Imported Liquor, But Did Not Authorize Discrimination.

In response to *Leisy*, Senator Wilson of Iowa introduced, and Congress passed, the Wilson Act of 1890. By its plain

language, the Wilson Act was intended to permit States to treat imported and domestic liquor the same:

> That all fermented, distilled or other intoxicating liquors or liquids *transported into* any state or territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such state or territory be subject to the operation and effect of the laws of such state or territory, enacted in the exercise of its police powers, *to the same extent and in the same manner* as though such liquids or liquors had been produced in such state or territory, *and shall not be exempt therefrom* by reason of being introduced therein in *original packages* or otherwise.

Act of Aug. 8, 1890, ch. 728, 26 Stat. 313 (emphases added).[3]

This Court then squarely held that the Wilson Act did not empower a State to discriminate in favor of its local liquor industry. In *Scott*, the Court considered a South Carolina law that required all liquor to be sold to consumers through dispensaries run by a state liquor authority. The law discriminated against imported liquor by establishing preferences for the state authority to purchase domestic liquor, by limiting the retail price of domestic, but not imported, wines, and by imposing testing requirements on imported liquors. 165 U.S. at 92-93.

After reviewing its cases striking down liquor regulations, the Court concluded that the Wilson Act "was not intended to confer upon any State the power to discriminate injuriously against the products of other States in articles whose manufacture and use are not forbidden, and which are therefore the subjects of legitimate commerce." *Id.* at 100. To the contrary, under the Wilson Act, "equality or uniformity of treatment under state laws was intended." *Id.* The Court acknowledged that a State "may forbid entirely the

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[3] The Wilson Act has never been repealed and remains codified as amended at 27 U.S.C. § 121.

manufacture and sale of intoxicating liquors," or it "may provide equal regulations for the inspection and sale of all domestic and imported liquors and be valid." *Id.* Nevertheless, the Wilson Act did not authorize the State to "establish a system which, in effect, discriminates between interstate and domestic commerce in commodities to make and use which are admitted to be lawful." *Id.* Accordingly, the Court held that "when a State recognizes the manufacture, sale and use of intoxicating liquors as lawful, it cannot discriminate against the bringing of such articles in, and importing them from other States." *Id.* at 101.

In short, *Scott* leaves no doubt that the Wilson Act had no effect on the line of cases that held that discriminatory laws violate the Commerce Clause. Subsequent cases confirmed the point.[4] The Wilson Act thus was intended to lift the immunity afforded imported liquor under the Commerce Clause and thereby permit a State to prohibit the sale of imported liquor in its original package to the same extent the State prohibited the sale of domestic liquor. *In re Rahrer*, 140 U.S. at 564.[5]

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[4] *See Vance* v. *W.A. Vandercook Co.*, 170 U.S. 438, 449-50 (1898) (explaining that although the Wilson Act "authorizes a state law to attach to an original package so as to prevent its sale, it did not contemplate and sanction the operation of a state law which injuriously discriminated against the products of other States, and which in consequence of such discrimination was not a police law in the correct sense of those words"); *Pabst Brewing Co.* v. *Crenshaw*, 198 U.S. 17, 28 (1905) (explaining that under the Wilson Act, the determination that a law is a valid police regulation "as to liquor manufactured in Missouri, *in the absence of discrimination*, is necessarily conclusive also as to the character of the law when applied to a similar article shipped from other States into Missouri after arrival at its destination, and when held for sale and consumption in that State") (emphasis added).

[5] In *In re Rahrer*, the Court rejected the argument that the Wilson Act was an unconstitutional delegation of Congressional power, explaining that Congress "simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part." 140 U.S. at 564. Congress "imparted no power to the state not then possessed, but

Nevertheless, the Court did hold that the immunity afforded goods in interstate commerce persisted with respect to imported liquor in one important respect. The Court held that the Wilson Act did not authorize a State to prohibit importation of liquor for personal use. In *Rhodes*, the Court revisited the same Iowa law that was struck down in *Bowman*. The Court recognized that the Wilson Act allowed the Iowa law to attach to imported liquor at an earlier time than the Commerce Clause would allow, and that Iowa thus could prohibit the *sale* of imported liquor. 170 U.S. at 420. The question in *Rhodes* was whether that Act permitted Iowa law to attach the moment the imported liquor reached the state line, before the completion of delivery to the consignee. *Id.* The Court construed the words "upon arrival" in the Wilson Act to mean that state law could attach only after delivery to the consignee, and not before then. *Id.* at 421. The Court noted that the Wilson Act was enacted in direct response to the holding in *Leisy* that the immunity of goods in interstate commerce precluded Iowa from prohibiting their sale. *Id.* at 423. The Wilson Act thus did not permit States to intercept shipments of liquor at the state border. *Id.*

The decision in *Rhodes* opened a substantial loophole in state prohibition laws. Although a State could prohibit the sale of imported liquor after it was delivered to the consignee, the State was powerless to stop the flow of liquor across its borders. As a result, the mail-order liquor trade into dry States flourished under the Wilson Act. See 49 Cong. Rec. 699-700 (1912) (statement of Sen. Sanders noting that the trade had grown to about 20,000,000 gallons of liquor per year under the Wilson Act). Bootleggers also boldly imported liquor, secure in the knowledge that state officials were powerless to touch the liquor until after it was delivered. Congressman Webb explained the problem to Congress:

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allowed imported property to fall at once upon arrival within the local jurisdiction." *Id.*

> To illustrate, sometime ago there were three packages of liquor [one barrel containing 500 half-pint bottles of liquor, one barrel containing 250 pint bottles of liquor, and a third barrel containing 140 quarts of liquor] shipped into a town in a near-by State, consigned to individuals of doubtful character, one of whom had previously been convicted of selling liquor in violation of the law of the State. . . . Owing to the character of the packages and the reputation of the consignees, the civil authorities were morally certain that these three packages of liquor were going to be used in violation of the State laws as soon as the consignees received them . . . yet not one of [the State's] officers dared touch the liquor while it remained . . . undelivered. The sacred law of interstate commerce protected these shipments of "blind-tiger" [illegal] liquor from molestation by State officers, not only while in transit, not only while they remained in the express office or depot, but also until they were actually delivered to those who intended to violate the State laws.

H.R. Rep. No. 62-1461, at 2 (1913). Congress considered a series of bills to address the limits of the Wilson Act, and in 1913, in the Webb-Kenyon Act, Congress provided the dry States with the power to intercept interstate shipments of liquor. *See* L. Rogers, *Interstate Commerce in Intoxicating Liquors Before the Webb-Kenyon Act*, 4 Va. L. Rev. 353, 365, 369-70 (1917).

### C. The Webb-Kenyon Act Closed The Hole Opened By *Rhodes*, But Did Not Empower States To Discriminate.

The Webb-Kenyon Act gave States the power to block the importation of liquor for use in violation of state law. Specifically, the Act provides that the "shipment or transportation . . . of any . . . intoxicating liquor of any kind, from one State . . . into any other State . . . which . . . is intended . . . to be received, possessed, sold, or in any manner

used, either in the original package or otherwise, in violation of any law of such State . . . is hereby prohibited." Act of Mar. 1, 1913, ch. 90, 37 Stat. 699, 699-700 (codified as amended at 27 U.S.C. § 122).[6] The Webb-Kenyon Act thus closed the gap that the Wilson Act left open. And it remains closed.

In *Clark Distilling Co.*, the Court recognized that the Webb-Kenyon Act "was enacted simply to extend that which was done by the Wilson Act." 242 U.S. at 324. Of particular relevance here, the Act's "purpose was to prevent the *immunity characteristic* of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught." *Id.* (emphasis added).

At issue in *Clark Distilling* was a West Virginia law that forbade the sale of intoxicating liquors, including for personal use. *Id.* at 316. The State sought to preclude a common

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[6] The complete text of the Webb-Kenyon Act is as follows:

> That the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited.

Ch. 90, 37 Stat. at 699-700. The Webb-Kenyon Act was re-enacted by Congress after the Twenty-first Amendment was ratified and remains codified at 27 U.S.C. § 122. Act of Aug. 27, 1935, ch. 740, tit. II, § 202(b), 49 Stat. 877, 877-78.

carrier from shipping liquor, intended for personal use, into the State. The Court noted that under *Leisy*, the State's action would be unconstitutional as an impermissible direct burden on interstate commerce. *Id.* at 320. Under the Webb-Kenyon Act, however, the State's action was permissible; it did not matter that the State had not actually outlawed personal use of liquor, because it had outlawed shipment for personal use, which brought the state law within the scope of the Webb-Kenyon Act. *Id.* at 323-24.

The Court also held that the Webb-Kenyon Act was not an unconstitutional delegation of congressional power to the States. The Court explained that "the will which causes the prohibitions to be applicable is that of Congress, since the application of state prohibitions would cease the instant the act of Congress ceased to apply." *Id.* at 326. The Court noted that under *Leisy*, interstate commerce in liquor was immune from state regulation unless Congress provided otherwise. *Id.* at 328-29. Congress had provided otherwise in the Wilson Act, by which Congress "divest[ed]" interstate shipments of liquor of their interstate commerce character so as to "strip them of the right to be sold in the original package free from state authority." *Id.* at 330. The Webb-Kenyon Act was "but a larger degree of exertion of the identical power which was brought into play in the [Wilson Act]," which had been upheld in *In re Rahrer*, and thus the Webb-Kenyon Act likewise was constitutional." *Id.*

The Court recognized in *Clark Distilling* that the historical environment of the Webb-Kenyon Act, including the debates on its passage, demonstrates that the purpose of the Act was to close the hole left open by the Wilson Act by further removing the immunity of liquor in interstate commerce, thereby giving States the ability to interrupt liquor shipments within their borders, according to their general prohibition policies. *Id.* at 322. The history of the Webb-Kenyon Act reflects no intent to change the long-standing rule against discriminatory state regulation.

Congressman Webb explained that the Webb-Kenyon Act was intended to address the problem that "under the present law and decisions [the Wilson Act and the decision in *Rhodes*], no State can interfere with the interstate shipment of liquor until it has been actually delivered to the consignee." H.R. Rep. No. 62-1461, at 2. "[B]ecause of this present state of the law no State official is permitted to touch any interstate shipment of liquor consigned to a 'blind tiger [an illegal seller of liquor],' 'bootlegger,' or 'speak-easy' until after it has been delivered to such violator of the State law." *Id.* Congressman Webb further explained that the proposed law would permit the State officers "to seize such liquor . . . and try it upon the question of whether it was intended to be used in violation of the laws of the State, and if the jury should find that it was so intended the delivery to the consignee would be prevented and the liquor confiscated." *Id.*

Senator Kenyon of Iowa (the laws of which State were declared unconstitutional in *Bowman*, *Leisy* and *Rhodes*) likewise explained that the bill was intended to address the immunity from state regulation afforded imported liquor under the Commerce Clause, and to allow the States to treat imported liquor according to their general liquor prohibitions (and foreshadowed what was to come with Section 2 of the Twenty-first Amendment):

> I am not concerned at all with the question of whether a State in the exercise of its police power might adopt a law prohibiting the manufacture or sale of intoxicating liquors. If it does do so, it ought to be able to make that law effective. If it adopts the contrary policy, it should be permitted to make that effective. If intoxicating liquors can be freely shipped into a State which has a prohibitory law and the State government is powerless to prevent it, and the Federal Government is likewise powerless to prevent it, if this liquor is to remain in the twilight zone between Federal and State jurisdiction,

> then, indeed, it is time for some further amendment to our Constitution.

49 Cong. Rec. 761 (1912).

The effect of the Webb-Kenyon Act on the holdings in *Rhodes*, *Leisy* and *Bowman* was mentioned repeatedly in the debates.[7] Conversely, no one ever suggested at any time that the Webb-Kenyon Act would change the rule in *Scott*, *Walling* or *Tiernan*, to permit States to discriminate against in-state and out-of-state liquors. Given that *Scott* held that the Wilson Act did not authorize States to discriminate, if the Webb-Kenyon Act had been intended to change the result of *Scott*, it is inconceivable that such an intent would have been left unspoken during the extensive debates.

Senator Root raised the concern that the Act placed "no limit upon the regulation by every State" of interstate traffic in liquor. 49 Cong. Rec. 2,915 (1913). Senator Stone made it clear, however, that the Act concerned *only* the ability of States to treat imported liquor the same as domestic liquor; it "would merely put the shipper outside of Missouri or Iowa or Arkansas upon a level, that is upon terms of equality, so far as State law and regulation go, with the shipper within the State." *Id.* at 2,917. Indeed, permitting discrimination would have been inconsistent with the very purpose of the Act, as Congressman Webb explained:

> [The Act will] remove the restrictions which now bind the action of the States in their efforts to honestly enforce their lawful prohibition enactments. . . . No man outside of my State ought to have a superior right to the citizen within my State. . . . If a man has not a right in my State to sell liquor, then certainly a citizen living in the District of Columbia ought not to have a superior right to enable him to sell it inside my State.

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[7] *See, e.g.*, 49 Cong. Rec. at 764-67; 49 Cong. Rec. 2,529, 2,689-90, 2,794-96, 2,807, 2,817, 2,834, 2,909-10 (1913).

*Id.* at 2,807. Instead of authorizing discrimination, the Webb-Kenyon Act "only stops the business of selling liquor within dry territory by persons outside that territory in violation of law." 49 Cong. Rec. at 700 (statement of Sen. Sanders).

There is no merit to Petitioners' contention that the Senate's rejection of a proposed section 2 to the Webb-Kenyon Act reflects a congressional intent to permit discrimination. To the contrary, the deletion of the language reflects nothing more than legislative expediency. Senate bill 4043 originally included, in a section 2, the language of the Wilson Act, amended to make the state law attach "upon arrival *within the boundaries* of such State or Territory and *before delivery to the consignee*." 49 Cong. Rec. at 2,687 (emphasis added). The bill that had already been approved by the House contained only language similar to that in section 1 of the Senate bill. See *id.* at 2,918, 2,920. Senator Gallinger moved to delete section 2 "in the hope and belief that it will more likely become a law than if we send the Senate bill to the House as a separate and independent measure, couched in different language from that which is employed in the House bill." *Id.* at 2,918. Section 2 thus was deleted solely to conform the Senate bill to the House bill. There was no discussion whatsoever of any need to delete the proposed Section 2 in order to permit States to engage in otherwise unconstitutional discrimination.[8]

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[8] In discussing the proposed section 2, Senator Kenyon raised the concern that there was "some incongruity" between section 1, which prohibited shipments of liquor with the intent to violate the law of the State, and section 2, which "would seem to recognize the transportation of liquors and at the same time apply the police powers." 49 Cong. Rec. at 702; *see also id.* at 2,687. Senator McCumber raised the concern that section 2 could be construed as an unconstitutional delegation of congressional authority, whereas section 1 was cast in prohibitory terms and made Section 2 unnecessary. *Id.* at 702-03. Other Senators were concerned that section 2 might be used to interfere with personal use of liquor, arguing that under section 2, a State could "interrupt an interstate shipment of liquor when it arrives within its borders," regardless of whether the shipment was intended to be used in violation of state law. *Id.*

Moreover, the Court has declared that "the power to regulate which was manifested in the Wilson Act and that which was exerted in enacting the Webb-Kenyon Law are essentially identical, the one being but a larger degree of exertion of the identical power which was brought into play in the other." *Clark Distilling*, 242 U.S. at 330. The power that was manifested in the Wilson Act did not permit States to engage in discrimination. *Scott*, 165 U.S. at 100. The deletion of the proposed section 2 thus did not clear the way for discriminatory state regulations.

The manifest purpose of the Webb-Kenyon Act was to remove the immunity from state regulation that the transportation of imported liquor into dry States continued to bear after the Wilson Act, so that States could seize liquor shipments in violation of state law before they reached the consignee. In sum, there is nothing in the language, purpose or history of the Webb-Kenyon Act to suggest that it was intended to change the rule of *Scott* and empower States to discriminate by erecting protectionist barriers to imported liquor.

### D. The Failure Of Prohibition Prompted Passage Of The Twenty-First Amendment But Provided No Basis To Empower States To Discriminate Against Interstate Commerce In Liquor.

The struggle of the dry States to enforce their laws against imported liquor was temporarily suspended in 1919 with the ratification of the Eighteenth Amendment. That Amendment prohibited "the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes." U.S. Const. amend. XVIII, § 1. Congress and the States had "concurrent power" to enforce the Amendment by

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at 2,688. None of the objections to proposed section 2 centered on discrimination.

"appropriate legislation." *Id.* § 2. With the passage of the Volstead Act in 1919, the country officially became "dry." National Prohibition Act, ch. 85, 41 Stat. 305 (1919).

By 1933, the country was in general agreement that the "Noble Experiment"[9] had failed. Illegal traffic in liquor was rampant. Consumption of intoxicating beverages remained popular, leading even upstanding citizens to flout the prohibition laws.[10]

Moreover, the Eighteenth Amendment had effected an unprecedented transfer of police power from the States to the federal government. Although the States had authority under the Eighteenth Amendment to pass legislation to enforce the Amendment, federal legislation was supreme and so the responsibility for enforcement fell largely on the federal government. As Senator Wagner explained in the debates surrounding repeal of the Eighteenth Amendment,

> [T]he question which has troubled the American people since the eighteenth amendment was added to the Constitution was not at all concerned with liquor. It was a question of government; *how to restore the constitutional balance of power and authority* in our Federal system which had been upset by national prohibition.

76 Cong. Rec. 4,144 (1933) (emphasis added). Section 2 of the Twenty-first Amendment restored that balance effectively by writing the relief from Commerce Clause immunity

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[9] "Our country has deliberately undertaken a great social and economic experiment, noble in motive and far-reaching in purpose." H. Hoover, *The New Day: Campaign Speeches of Herbert Hoover, 1928*, at 29 (1928), *available at* http://www.bartleby.com/66/88/28888.html.

[10] As Congressman LaGuardia explained during the repeal debates, "A change in our liquor policy is necessary, not only because of the widespread violation of the law by the criminal element but the general and universal disregard of the law by well-meaning, law-abiding people." 76 Cong. Rec. 4,514 (1933).

provided by the Wilson and Webb-Kenyon Acts into the Constitution.

## II. SECTION 2 OF THE TWENTY-FIRST AMENDMENT EFFECTIVELY WROTE THE WEBB-KENYON AND WILSON ACTS INTO THE CONSTITUTION, BUT DID NOT AFFECT THE RULE AGAINST DISCRIMINATORY STATE REGULATION OF LIQUOR.

With the repeal of the Eighteenth Amendment, States once again were faced with the prospect that the immunity from state regulation afforded liquor in interstate commerce would frustrate state efforts to remain "dry" following the end of nationwide prohibition. Congress addressed this concern in Section 2 of the Twenty-first Amendment,[11] which provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, § 2. Section 2 was included not to expand the scope of the Webb-Kenyon and Wilson Acts, but to preserve them against repeal or constitutional attack.

### A. The Debates Surrounding Section 2 Demonstrate That It Was Intended To Constitutionalize The Commerce Clause Framework Established Under The Wilson And Webb-Kenyon Acts.

As this Court has recognized, the "wording of § 2 . . . closely follows the Webb-Kenyon and Wilson Acts, expressing the framers' clear intention of constitutionalizing the Commerce Clause framework established under those statutes." *Craig*, 429 U.S. at 205-06 (footnote omitted). Prior to Prohibition, Congress (through the Webb-Kenyon Act) had granted dry States the ability to intercept out-of-state liquor

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[11] Section 1 of the Amendment repealed the Eighteenth Amendment. U.S. Const. amend. XXI, § 1. Section 3 provided for ratification by conventions rather than by the state legislatures. *Id.* § 3.

before delivery to the consignee. Although the Webb-Kenyon Act was not repealed by the Eighteenth Amendment, *McCormick & Co.* v. *Brown*, 286 U.S. 131, 141 (1932), its constitutionality was not considered sufficiently secure to ensure that States that chose to remain dry could protect themselves against unrestrained importation of liquor. Two central themes emerge from the Senate debate on Section 2: (1) Section 2 was needed to secure the Webb-Kenyon Act against both constitutional attack and repeal; and (2) Section 2 was coincident with, and did not extend, the Webb-Kenyon Act.

The need to secure the Webb-Kenyon Act from constitutional attack and repeal was highlighted by Senator Borah. After Senator Robinson proposed to strike Section 2 from the resolution entirely, 76 Cong. Rec. 4,170 (1933), Senator Borah argued that Section 2 was necessary because absent Section 2, Congress would be "asking the dry States to rely upon the Congress of the United States to maintain indefinitely the Webb-Kenyon law." *Id.*; see also *id.* at 4,141 (statement of Sen. Blaine).

Moreover, Senator Borah argued, the Webb-Kenyon Act was "still of doubtful constitutionality and which, as it was upheld by a divided court, might very well be held unconstitutional upon a re-presentation of it." *Id.* at 4,170. As Senator Borah explained,

> The Webb-Kenyon Act was sustained by the Supreme Court of the United States by a divided court. The President of the United States—President Taft, who was afterwards Chief Justice—vetoed it on the ground that it was unconstitutional. The Attorney General of the United States rendered an opinion to the effect that it was unconstitutional. Elihu Root, when in the Senate, argued that it was unconstitutional. Mr. Justice Sutherland, who is now upon the Supreme Bench, argued before the Senate that it was unconstitutional.

*Id.*; see also *id.* at 4,141 (statement of Sen. Blaine). Senator Borah went on to describe the "history of the fight of the dry States to remain dry and be protected," from *Bowman* and *Leisy* through the Wilson Act and the Webb-Kenyon Act. *Id.* at 4,170-72. Section 2 was necessary, he argued, to ensure that there would never be a return to the situation that *Bowman* and *Leisy* had created. *Id.* at 4,172. After Senator Robinson withdrew his challenge to Section 2, Senator Borah responded:

> All this was sought to be remedied by the Webb-Kenyon Act, and I am very glad indeed the able Senator from Arkansas has seen fit to recognize the justice and fairness to the States of incorporating it permanently into the Constitution of the United States.

*Id.* Thus, as Senator Blaine, speaking on behalf of the Senate Judiciary Committee, which had proposed the Twenty-first Amendment, explained, Section 2 was included "to assure the so-called dry States against the importation of intoxicating liquor into those States." *Id.* at 4,141.

The Senate debates over Section 2 also made clear that its purpose and effect would be to lift the "immunity" from state regulation that otherwise would attach to liquor in interstate commerce, to allow imported liquor to be intercepted before it reached the "consignee" and thus "assist the States that want to be dry to remain dry." *Id.* at 4,168. For example, Senator Walsh specifically referred to the Court's ruling in *Rhodes*, which he described as holding "that under the existing Constitution the right obtains on the part of any citizen to pass his goods into another State, and they remain under the protection of the Federal Constitution until they actually reach the hands of the consignee." *Id.* at 4,219. As Senator Walsh explained, under *Rhodes*, imported liquor "is immune from any control by State statutes until it actually reaches the possession of the consignee." *Id.* He stated that he supported Section 2 because it, like the Webb-Kenyon Act, would "make the intoxicating liquor subject to the laws of the State

once it passed the State line and before it gets into the hands of the consignee as well as thereafter." *Id.* Senator Glass then echoed this point in his response, stating that under Section 2, "there can be no consignee of intoxicating liquors in a dry State." *Id.*

Conversely, the issue of what one "wet" State could do regarding competing liquor from another "wet" State simply was not under consideration. As Senator Glass explained, "Liquors may be shipped across a State in interstate commerce from one wet State to another wet State, but [Section 2] as I have drafted it prohibits the shipment of intoxicating liquors into a State whose laws prohibit the manufacture, sale, or transportation of liquors." *Id.*

Although Senators Borah and Walsh took pains to discuss the problem of the immunity afforded liquor moving in interstate commerce, which was at issue in the Court's decisions in *Bowman*, *Leisy* and *Rhodes*, there was *no* discussion by any Senator of the decisions in *Scott*, *Walling* or *Tiernan*, or of any issue involving the States' authority to discriminate against interstate commerce. As noted above, the Court previously had held in *Scott* that the Wilson Act did not permit States to discriminate against interstate commerce in liquor, and Congress made no effort to grant States that power in the Webb-Kenyon Act. Had Section 2 been intended to change the longstanding rule against discriminatory state regulation of liquor, some mention of it would have been made during the debates. However, the debates are tellingly silent on this point. In short, the history of Section 2 makes it clear that Section 2 was intended simply to preserve the Webb-Kenyon and Wilson Acts against repeal or constitutional attack; it was not intended to affect the long-standing rule against discriminatory state liquor laws.

Neither the House debate nor the State Ratification Conventions included any substantial discussion of Section

2.[12] Nonetheless, the sporadic discussions of Section 2 in the House of Representatives make clear that members of the House viewed it as nothing more than an "attempt[] to protect dry States." 76 Cong. Rec. at 4,518 (statement of Rep. Robinson). Congressman Lea, in an extension of remarks on an appropriation bill, prior to the House debates on the proposed Amendment, characterized Section 2 as "the extreme of State rights." *Id.* at 2,776. But his concern was that because Congress already had the authority to prevent interstate shipments of liquor in violation of state laws, Section 2 was unnecessary and might require the federal government to sanction "unwise" state laws. *Id.* Others in the House stressed that the Amendment returned to the States the power to choose whether to be dry, as well as the responsibility for enforcing their prohibition laws, matters that nationwide Prohibition had temporarily vested in the federal government. See *id.* at 4,523-24 (statement of Rep. McSwain). There was no suggestion that Section 2 would do anything more than enshrine the Webb-Kenyon and Wilson Acts into the Constitution.

### B. Congress's Rejection Of A Proposed Section 3 To The Twenty-First Amendment Does Not Suggest That Section 2 Was Intended To Do More Than Write The Webb-Kenyon And Wilson Acts Into The Constitution.

Congress's rejection of a proposed Section 3 has no bearing on whether Section 2 overruled the longstanding prohibition against discriminatory state liquor regulations. Proposed Section 3 would have provided Congress with "'concurrent

[12] Like the Senate debate, the House debate largely focused on ratification by conventions instead of legislatures and whether the Amendment would prevent the return of the saloon. *See, e.g.*, 76 Cong. Rec. at 4,511 (Statement of Rep. Guyer); *id.* at 4,515 (Statement of Rep. Celler). The state conventions generally focused on the question of repeal and did not debate Section 2. *See generally Ratification of the Twenty-First Amendment to the Constitution of the United States* (E.S. Brown ed., 1938).

power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold.'" 76 Cong. Rec. at 4,141. This provision was proposed in order to give Congress the power "to prevent the restoration of the saloon." *Id.* (statement of Sen. Blaine). This provision was the subject of fervent objections that it "does not correct the central error of national prohibition" because it "does not restore to the States responsibility for their local liquor problems [or] withdraw the Federal Government from the field of local police regulation into which it has trespassed." *Id.* at 4,144 (statement of Sen. Wagner). As Senator Wagner succinctly explained, if the proposed Section 3 were adopted, the country would "have expelled the system of national control [of liquor] through the front door of section 1 and readmitted it forthwith through the back door of section 3." *Id.* at 4,147. Section 3 thus was eliminated because it would have given the federal government too much power over local liquor matters, thus ignoring the lessons of Prohibition.

In arguing against Section 3, Senator Blaine stated that "[t]he purpose of section 2 is to restore to the States by constitutional amendment absolute control in effect over interstate commerce affecting intoxicating liquors which enter the confines of the States." *Id.* at 4,143. Considered in isolation, this statement could suggest that the scope of Section 2 was intended to relieve the States of all Commerce Clause constraints on their authority. Senator Blaine made that one statement, however, not as an explication of the scope of Section 2, but as part of an argument against the inclusion of Section 3. He stated that under Section 2, the States "are granted larger power in effect and are given greater protection, while under section 3 the proposal is to take away from the States the powers that the States would have in the absence of the eighteenth amendment." *Id.* Senator Blaine therefore argued that "section 3 is inconsistent with section 2, and the two sections are incompatible, and that section 3 ought to be taken out of the resolution." *Id.* Thus,

when viewed in context, it becomes clear that Senator Blaine's statement did not refer to the wholesale repeal of the Commerce Clause to permit discriminatory and protectionist state laws. Instead, Section 3's deletion restored to the States their *police powers* to regulate, or even prohibit, the use of liquor in saloons or elsewhere within their borders. The statement thus cannot carry the weight of a conclusion that Section 2 would permit wet States to engage in discrimination against other wet States.

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In sum, the history of the Twenty-first Amendment shows that—despite numerous decisions by this Court striking down discriminatory state laws—Congress never attempted to grant States the right to discriminate. Instead, Congress chose to enshrine the Webb-Kenyon and Wilson Acts into the Constitution to ensure that the immunity from State regulation afforded liquor in interstate commerce would never again prevent dry States restricting the flow of liquor across their borders. The history of the Amendment thus demonstrates that the Amendment had no effect on the traditional rule that the Commerce Clause prohibits economic protectionism.

## III. THE DECISION IN *YOUNG'S MARKET* IS CONSISTENT WITH THE HISTORY OF THE TWENTY-FIRST AMENDMENT.

The Court has long recognized that the Twenty-first Amendment does not provide the States with unfettered authority over intoxicating liquors.[13] Nevertheless, it is useful to look closely at *State Board of Equalization* v. *Young's Market Co.*, 299 U.S. 59 (1936), both because it was the Court's first case to construe the Amendment and because, for a short period, the case was cited as support for a broad reading of the Amendment. A careful reading of *Young's Market* demonstrates it is not inconsistent with the history of the Twenty-first Amendment and presents no obstacle to a

[13] *See infra* notes 14-15.

clear holding that the Amendment did not *sub silentio* repeal the anti-discrimination principle of the Commerce Clause.

In *Young's Market*, several wholesalers challenged a California regulation that imposed a license fee of $500 for the privilege of importing beer to any place within California. The license to import did not include the privilege of selling, for which wholesalers paid a separate license fee of $50. The plaintiffs claimed that importer's license requirement discriminated against wholesalers of imported beer, in violation of the Commerce Clause. *Id.* at 60-61.

The Court, however, expressly determined that the case simply did "not present a question of discrimination prohibited by the commerce clause." *Id.* at 62. The Court explained that the California regulations imposed "no discrimination against [the plaintiffs] *qua* wholesalers" because "[t]he fee exacted for the privilege of selling, and the conditions under which a sale may be made, are the same whether the beer to be sold is imported or domestic or is both." *Id.* at 61. Any Commerce Clause concerns raised by a fee for the privilege of importing were raised "not because it resulted in discrimination, but because the fee would be a direct burden on interstate commerce," which would have raised such concerns "even if the State had exacted an equal fee for the privilege of transporting domestic beer from its place of manufacture to the wholesaler's place of business." *Id.* at 62. Because the case did not involve discrimination, the Court had no occasion to determine whether the Twenty-first Amendment overturned the Court's long line of cases striking down discriminatory state liquor laws.

The holding in *Young's Market* is consistent with the historical understanding that the Twenty-first Amendment addressed the "immunity" problem of liquor in interstate commerce by writing the Webb-Kenyon and Wilson Acts into the Constitution, but had no effect on the longstanding rule against discrimination. Any Commerce Clause concerns arose in *Young's Market* because the fee was a "direct burden

on interstate commerce." *Id.* at 62. As explained above, the Webb-Kenyon and Wilson Acts were intended to permit States to impose such "direct burdens," which previously had been prohibited by *Bowman*, *Leisy* and *Rhodes*. See, *e.g.*, *McCormick*, 286 U.S. at 142-43. Because *Young's Market* involved only a fee that imposed a "direct burden" on interstate commerce, the result in *Young's Market* thus requires no departure from the conclusion that Section 2 was intended merely to "constitutionaliz[e] the Commerce Clause framework established under those statutes." *Craig*, 429 U.S. at 205-06. Further, because all of the plaintiffs were California citizens, *Young's Market*, 299 U.S. at 60, the Court's holding went no further than to decide that the State could impose such a "direct burden" by charging local entities a fee for the "privilege of importation." It does not follow that a State may bar an out-of-state producer from entering a market that the State has determined should be open to in-state producers.

Shortly after *Young's Market* was decided, the Court, without further discussion of Section 2 or the fact that *Young's Market* did not involve discrimination, relied upon dicta in *Young's Market* to conclude that "the right of a State to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause." *Joseph S. Finch & Co.* v. *McKittrick*, 305 U.S. 395, 398 (1939); *Indianapolis Brewing Co.* v. *Liquor Control Comm'n*, 305 U.S. 391, 394 (1939); see also *Mahoney* v. *Joseph Triner Corp.*, 304 U.S. 401, 403-04 (1938) ("[S]ince the adoption of the Twenty-first Amendment, the equal protection clause is not applicable to imported intoxicating liquor."). However, the Court in *Young's Market* admitted that it did not consider the history of Section 2. 299 U.S. at 63-64. When the history of the Amendment is considered, it becomes clear that Section 2 left intact the anti-discrimination principle of the Commerce Clause, and that the holding in *Young's Market* provided no

basis for reading Section 2 more broadly than its language and evident purpose would support.

In any event, subsequent decisions of this Court have made it clear that the Twenty-first Amendment does not have the tremendous breadth that certain language in *Young's Market* and the cases that immediately followed may suggest.[14] The Twenty-first Amendment does not affect the restraints of equal protection, free speech, due process, establishment of religion or the Import-Export Clause.[15] It also should not be read to repeal the anti-discrimination component of the Commerce Clause in the area of intoxicating liquors. See *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 276 (1984) (holding that a discriminatory tax exemption in favor of

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[14] *See Healy* v. *Beer Inst.*, 491 U.S. 324, 340-41 (1989); *id.* at 344 (Scalia, J., concurring); *324 Liquor Corp.* v. *Duffy*, 479 U.S. 335, 352 (1987) (holding that the Twenty-first Amendment did not save a state law that authorized price fixing by wholesalers); *Brown-Forman Distillers Corp.* v. *N.Y. State Liquor Auth.*, 476 U.S. 573, 584-85 (1986) (holding that the Twenty-first Amendment did not save New York's price affirmation law); *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 276 (1984); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 716 (1984) (holding that state liquor regulations were preempted despite the Twenty-first Amendment); *Cal. Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 109, 114 (1980) (holding that the Twenty-first Amendment did not save California's wine pricing system from violating the Sherman Act ); *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-32 (1964); *United States* v. *Frankfort Distilleries, Inc.*, 324 U.S. 293, 299 (1945) (explaining that Twenty-first Amendment "has not given the states plenary and exclusive power to regulate the conduct of persons doing an interstate liquor business outside their boundaries"); *Collins* v. *Yosemite Park & Curry Co.*, 304 U.S. 518, 538 (1938) (rejecting the argument that the Twenty-first Amendment gave California the right to regulate the importation from other States to, and sale of liquor within, Yosemite National Park).

[15] *See 44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484 (1996) (plurality opinion) (commercial speech); *Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116 (1982) (Establishment Clause); *Craig*, 429 U.S. at 206-07 (equal protection); *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971) (due process); *Dep't of Revenue* v. *James B. Beam Distilling Co.*, 377 U.S. 341 (1964) (Import-Export Clause).

locally-produced wines and liquors is not saved by the Twenty-first Amendment); cf. *Healy* v. *Beer Inst.*, 491 U.S. 324, 340-41 (1989) (holding that the State's price affirmation statute violated the Commerce Clause because it discriminated against brewers and shippers of imported beer, and had the effect of controlling commerce occurring outside the State); *id.* at 344 (Scalia, J., concurring) (explaining that the law's "discriminatory character eliminates the immunity afforded by the Twenty-first Amendment").

To the contrary, "[t]o draw a conclusion from [the Court's early Section 2 cases] that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would . . . be an absurd oversimplification." *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-32 (1964). As the history of the Twenty-first Amendment demonstrates, the purpose of Section 2 of the Amendment was simply to write the Webb-Kenyon and Wilson Acts into the Constitution; it "was not to empower States to favor local liquor industries by erecting barriers to competition" *Bacchus Imports*, 468 U.S. at 276.

## CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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September 23, 2004

## APPENDIX

*Amici* include the following organizations of California vintners and winegrowers:

***Napa Valley Vintners:*** The Napa Valley Vintners is a nonprofit regional trade association with an active membership of nearly 250 Napa Valley wineries. Founded in 1943, the Napa Valley Vintners represents a tradition of dedicated vintners and grape growers who have worked and cared for this premier wine-growing region since the early 1800s. Today, the members of the Napa Valley Vintners focus on preserving Napa Valley as a viticultural and enological treasure, producing the highest quality wines, and promoting the Napa Valley Appellation both nationally and internationally as one of the finest wine-growing regions in the world.

***Sonoma County Wineries Association:*** The Sonoma County Wineries Association is a trade association committed to promoting the wines of the fourteen wine-growing appellations in Sonoma County, California. Franciscan mission fathers laid the foundation for the Sonoma County wine industry with the planting of mission vineyards in 1823. Today, in Sonoma County, there are more than 190 wineries, over half less than 20 years old. The Sonoma County Wineries Association membership includes 170 Sonoma County wineries and vineyards, including small, family-owned wineries that, as they did over 150 years ago, continue to exist comfortably alongside larger entities, each producing premium wine in its own unique style.

***Monterey County Vintners and Growers Association:*** The Monterey County Vintners and Growers Association (MCVGA) was formed in 1973 to establish Monterey County as a premium wine grape-growing region. Since that time, Monterey Wine Country has grown to over seventy-five vintners and growers and boasts nearly 40,000 acres of

grapes, making it one of the largest premium wine grape-growing regions in California. The Monterey County Vintners and Growers Association brings together the talents and resources of grape growers and wine producers to promote and support their leadership in the art, the science and the business of wine.

***El Dorado Winery Association:*** The El Dorado Winery Association is a trade association that is comprised of nineteen, small, family wineries in El Dorado County, California. Wines have been produced in El Dorado County since the early 1850s. Today, the members of the El Dorado Winery Association make fine wine in small lots, producing from just over one thousand cases of wine per year to about thirty thousand cases per year. The members of the El Dorado Winery Association are dedicated to developing and promoting the El Dorado Appellation.

***Amador Vintners' Association:*** The Amador Vintners' Association is a regional trade association of twenty-five wineries from Amador County, California. Located in the western foothills of the Sierra Nevada mountain range in central California, Amador County boasts 2,700 acres of wine grapes—a high percentage of which are farmed organically—and twenty-five wineries. Wines have been produced in Amador County since the Gold Rush of the 1850s, and some of the vineyards planted during that era survive to this day. The twenty-five member wineries of the Amador County Vintners Association are primarily small, family-owned operations whose proprietors make and sell their own wines.

***Temecula Valley Winegrowers Association:*** The Temecula Valley Winegrowers Association is a regional trade organization of wineries, winegrowers, and related businesses in and around California's Temecula Valley. Mission vineyards were established in Temecula in 1820, and today, the wineries and vineyards of Temecula Valley produce some of the finest wines and winegrapes in the world. The seventy-five members of the Temecula Valley Winegrowers

Association are dedicated to promoting the making and growing of quality wine and winegrapes in the Temecula Appellation.

***Santa Cruz Mountains Winegrowers' Association:*** The Santa Cruz Mountains Winegrowers' Association is a regional organization of wineries, vineyards, and businesses in the Santa Cruz Mountains of California. The Santa Cruz Mountains has been recognized as a premium wine producing region since the late 1800's. Although few of those original wineries survived Prohibition, today, there are over sixty, small, family-owned wineries in this unique grape-growing region. The more than 180 members of the Santa Cruz Mountains Winegrowers' Association focus on producing the highest quality wines and promoting the Santa Cruz Mountains Viticultural Appellation.

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Supreme Court, U.S.
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Nos. 03-1116, 03-1120, 03-1274

IN THE

# Supreme Court of the United States

JENNIFER M. GRANHOLM, Governor, *et al.*,
*Petitioners*,

v.

ELEANOR HEALD, *et al.*,
*Respondents*.

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,
*Petitioner*,

v.

ELEANOR HEALD, *et al.*,
*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## BRIEF OF THE NATIONAL ALCOHOL BEVERAGE CONTROL ASSOCIATION AND THE NATIONAL CONFERENCE OF STATE LIQUOR ADMINISTRATORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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## QUESTION PRESENTED

Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of Sec. 2 of the 21st Amendment?

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**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## BRIEF OF THE NATIONAL ALCOHOL BEVERAGE CONTROL ASSOCIATION AND THE NATIONAL CONFERENCE OF STATE LIQUOR ADMINISTRATORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

---

Pursuant to Rule 37 of the Rules of this Court, the National Alcohol Beverage Control Association, Inc. (NABCA) and the National Conference of State Liquor Administrators (NCSLA), by their attorney, file this brief as *amici curiae* in

support of the position of the Petitioners and respectfully urge this Court to overturn the judgment of the United States Court of Appeals for the Sixth Circuit in *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003).[1] This brief is filed with the consent of the parties, evidence of which is submitted with this brief.

## INTEREST OF THE *AMICI CURIAE*

NABCA is a Wyoming non-profit corporation whose members are the 19 jurisdictions[2] that directly control the distribution and sale of alcohol beverages through the operation of state-owned wholesale and, in some cases, retail outlets; these jurisdictions also regulate the sale of alcohol beverages by private outlets such as package stores, restaurants and taverns. NCSLA is an unincorporated membership association whose members are the remaining jurisdictions that simply regulate private sellers of alcohol beverages. Some jurisdictions are members of both organizations. Taken together, NABCA and NCSLA represent the state, and, in some cases, local government agencies charged with regulating the distribution and sale of alcohol

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[1] Counsel of record for the *amici curiae* was the sole author of this brief. No person or organization other than the *amici curiae* has made a monetary contribution to the preparation or submission of this brief.

[2] NABCA's members include the Alabama Alcoholic Beverage Control Board, Idaho State Liquor Dispensary, Iowa Alcoholic Beverages Division, Maine State Liquor & Lottery Commission, Michigan Liquor Control Commission, Mississippi State Tax Commission, Montana Department of Revenue Liquor Division, Montgomery County (MD) Department of Liquor Control, New Hampshire State Liquor Commission, North Carolina Alcoholic Beverage Control Commission, North Carolina Association of ABC Boards, Ohio Division of Liquor Control, Oregon Liquor Control Commission, Pennsylvania Liquor Control Board, Utah Department of Alcoholic Beverage Control, Vermont Department of Liquor Control, Virginia Alcoholic Beverage Control Board, Washington State Liquor Control Board, West Virginia Alcoholic Beverage Control Administration and Wyoming Department of Revenue Liquor Division.

beverages in all 50 states. Several of these agencies are or have been defendants in litigation similar to the instant case and all would have their ability to regulate alcohol beverages significantly impacted by the decision in this matter.

## SUMMARY OF ARGUMENT

The plain language as well as the judicial interpretation of the Twenty-First Amendment clearly supports the validity of the state laws that are under attack herein. Further, a state's regulation of the interstate shipment of alcohol beverages directly to its consumers is an inherent part of a state's structure of its alcohol beverage industry, a function that clearly falls within the so-called "core" powers of the Twenty-First Amendment and that also acts to immunize a state's action from Commerce Clause scrutiny.

Alternatively, even if one accepts the premise that a state's regulation is precluded by the Commerce Clause, one must consider the impact of the Webb-Kenyon Act, a federal statute that both pre-dates and post-dates the adoption of the Twenty-First Amendment and that serves to strip alcohol beverages of their normal interstate commerce protection, thus allowing a state to impose the kind of regulation on the importation of alcohol beverages that is at issue here.

## ARGUMENT

### I. MICHIGAN'S APPROACH TO REGULATION IS PERMISSABLE UNDER THE PLAIN LANGUAGE AND JUDICIAL INTERPRETATION OF THE TWENTY-FIRST AMENDMENT

*Drink is in itself a creature of God, and to be received with thankfulness.*

Increase Mather, 1673

*The thing has arrived to such a height, that we are actually threatened with becoming a nation of drunkards.*

- Greene and Delaware Moral Society, 1815

The production, sale and regulation of alcohol beverages have long been a source of controversy as well a fertile area for litigation within the United States. In the early days of the nation, the new federal government sparked an agrarian uprising—known as the "Whiskey Rebellion"—when it sought to impose, for the first time, a federal excise tax on distilled spirits, in part to fund the debt of the Revolutionary War.

While the federal government thus staked a "claim" to its right to tax alcohol beverages, it generally did not seek to impose other restrictions on its production and distribution. That responsibility fell to the individual states, which sought to exercise control over the product's distribution by licensing sellers, an action that was upheld by this Court in *The License Cases*, 46 U.S. 5 How. 504 (1847). It should be noted that, even today, the federal government's regulation of alcohol beverages outside of the tax area is limited to scrutiny of certain trade practices. The "imposition" of a national minimum drinking age was not done directly, but rather as an exercise of Congress' spending power. In fact, this Court questioned whether Congress even possessed the power to directly impose a national minimum drinking age. *South Dakota v. Dole*, 483 U.S. 203, 212 (1987).

A strong anti-alcohol movement emerged in the latter half of the nineteenth century. Several states attempted to legislate a totally "dry" environment in which the sale of alcohol was prohibited, the National Prohibition Party was formed in an effort to impact federal elections, and such groups as the Women's Christian Temperance Union and the Anti-Saloon League were born out of a concern about the adverse effect that excessive consumption of alcohol beverages was having on the country's moral fabric.

Some states opted for virtually unrestricted commerce in alcohol beverages while others opted to be "dry," that is, they prohibited virtually all traffic in alcohol beverages. Still others adopted "local option" statutes, giving cities, towns and municipalities the authority to determine whether to allow the sale and distribution of alcohol beverages.

Although Congress generally adopted a "hands-off" policy with regard to alcohol beverage regulation, except for federal taxation of the product, state regulation of trade in alcohol beverages soon ran afoul of the Constitution's grant to Congress—and Congress alone—of the authority to regulate commerce among the states. U.S.Const. Art. I., Sec. 8, cl. 3. Expressly overruling a 50-year-old precedent, this Court declared invalid an Iowa law regulating the sale of alcohol beverages which had been shipped from outside the state. *Leisy v. Hardin*, 135 U.S. 100 (1890).

Reacting to *Leisy*, Congress passed the so-called "Original Packages Act," also known as the Wilson Act, which declared that, upon arrival into a state, alcohol beverages became subject to the regulatory scheme of the state, in the same manner as alcohol beverages produced within the state. Act of August 8, 1890, c. 728, 26 Stat. 313 (current version at 27 U.S.C. §121).

Passage of the Wilson Act, however, did not totally clarify the ability of states to regulate trade in alcohol beverages within their borders. Although the constitutionality of the Wilson Act was upheld, *In re Rahrer*, 140 U.S. 545 (1891), in *Rhodes v. Iowa*, 170 U.S. 412 (1898), this Court held that, although alcohol beverage products lose their character as items of interstate commerce *after* their delivery into a state, the Wilson Act did not authorize the laws of a state to be applied to such merchandise while in transit and prior to delivery to a consignee within the state.

Similarly, in *Vance v. W.A. Vandercook Company*, 170 U.S. 438 (1898), this Court declared that the Wilson Act did not recognize the right of a state to prevent an individual from ordering alcohol beverages from outside the state for his own consumption.

Congress moved to close this "loophole," but not until 1913 did it succeed in passing, over the veto of President William Howard Taft, what is now commonly referred to as the Webb-Kenyon Act. Act of Mar. 1, 1913, c. 90, 37 Stat. 699 (current version at §27 U.S.C. 122). The title of the Act—"An Act divesting intoxicating liquors of their interstate character in certain cases"—is instructive in determining the motivation for its adoption. Rep. Clayton, Chairman of the House Judiciary Committee, which extensively debated the bill prior to its consideration by the full House of Representatives, clearly explained its purpose when he declared

> The purpose (of the bill) is to take the protecting arm of the Federal Government, by virtue of the interstate commerce clause of the Constitution, from around the illicit dealers in liquors, and is to allow the States which have passed police regulations restricting or forbidding the sale of liquor to better enforce those regulations.

49 Cong. Rec. H2864 (daily ed. February 8, 1913).

This Court upheld the validity of the Act, holding that there was no reason to state that because Congress had a power to forbid movement of a product in interstate commerce, it did not also have the authority to establish a regulation making it impossible for one state to violate the prohibition of the law of another state in interstate commerce. *Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U.S. 311 (1917). That analysis is still good law today.

This Commerce Clause exception was quickly swallowed up by the national experiment known as Prohibition when the Eighteenth Amendment was declared to have been ratified by

the requisite number of states on January 29. 1919. Section 1 of the Eighteenth Amendment not only banned the manufacture, sale or transportation of alcohol beverages within a state, but it also prohibited the importation into any state of alcohol beverages originating in another state.

When it became apparent that Prohibition was a failure, Congress moved to undo its Constitutional underpinning by adopting the Twenty-First Amendment; ratification was completed on December 5, 1933. Congress could have completed its effort merely by adoption of Section 1 alone. That would have repealed the ban on activity within a state, as well as the prohibition on importation of alcohol beverages into any state. However, Congress chose to add Section 2, which plainly declares

> The transportation or importation into any State, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

To underscore the Congressional statement on the impact of the Amendment, the Webb-Kenyon Act was subsequently re-enacted without change 1935. Act of Aug. 27, 1935, c. 740 §202(b), 49 Stat. 877 (current version at 27 U.S.C. §122).

These two affirmative statements of Congressional intent make it crystal clear that Congress meant to create an exception to the normal rules of interstate commerce regulation in the case of alcohol beverages. As the Constitution's sole regulator of interstate commerce, Congress clearly has the power to authorize state regulations that burden or discriminate against interstate commerce, *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946). Using its authority, Congress could have restricted a state's authority to ban or regulate imports only in situations where the state treated in-state products in the same manner, but it did not. Nowhere in the plain language of the Twenty-First Amendment is there a hint that, for the purpose of regulating

transportation or importation into any state, a state must treat out-of-state alcohol beverages in the same manner in which it treats in-state alcohol beverages.

This Court promptly recognized the impact of the Twenty-First Amendment, noting that it "sanctions the right of a state to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause." *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939). This Court has continued to recognize that the Twenty-First Amendment "primarily created an exception to the normal operation of the Commerce Clause," *Craig v. Boren*, 429 U.S. 190, 206 (1976), and that the resultant authority of the state under the Amendment over importation of alcohol beverages "is transparently clear." *Id.* at 207.

Even as this Court later appeared to suggest that the grant of authority under the Twenty-First Amendment must be balanced with Congress' power under the Commerce Clause under certain conditions, the scope of those conditions has been made abundantly clear:

> The Twenty-First Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations.

*California Retail Liquor Dealers Association v. Midcal Aluminum*, 445 U.S. 97, 110 (1980)

In its most recent review of the Twenty-First Amendment, this Court noted that Section 2 delegated to the states the power "to prohibit commerce in" alcohol beverages and further stated that state "regulatory power over this segment of commerce is therefore largely 'unfettered by the Com-

merce Clause.'" *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 515 (1996), citing *Ziffrin*, supra.

This Court has thus clearly demarcated the scope of the Twenty-First Amendment: states have "virtually complete control" over the importation of alcohol beverages. As to "other regulations," however, the state's authority must be balanced against the Commerce Clause.

In holding the Michigan statute invalid because of a conflict with the Commerce Clause, the court below misapplied this long-standing and clear interpretation of the Twenty-First Amendment. The lower court contended that the "proper approach" in this case was to apply traditional dormant Commerce Clause analysis and, if the state's approach to regulation was found to be unconstitutional, to determine whether the unconstitutionality was somehow "saved" by a Twenty-First Amendment analysis.

The *amici cuirae* believe that this approach is erroneous; the lower court should have first looked at the plain language of the Twenty-First Amendment to determine its applicability to the situation at hand before going on to review other sections of the Constitution, not the other way around.

Further, the court below also erroneously relied on *Bacchus Imports v. Dias*, 468 U.S. 263 (1984) to support its reasoning. That case involved a state's regulation of alcohol beverages—in this case, taxation—once the beverages had arrived into the state. The state did not seek to justify the tax on the ground that it was designed to promote temperance or to carry out any other purpose of the Amendment; in fact, the state acknowledged that the purpose of the discriminatory taxation scheme was to promote a local industry *Id.* at 276. Indeed, the Twenty-First Amendment claim in that case was not even raised by the state until Supreme Court consideration.

Thus, based on the plain language and judicial interpretation of the Twenty-First Amendment, the opinion of the court below should be reversed and the validity of Michigan's statute upheld. By the same reasoning, New York and other states should be permitted to regulate imports of alcohol beverages in the manner they see fit, even if that regulation involves differential treatment of in-state products.

## II. MICHIGAN'S STATUTE CLEARLY FALLS WITHIN THE "CORE POWERS" OF THE TWENTY-FIRST AMENDMENT THAT HAVE BEEN RESERVED TO THE STATES

Even if one takes the position that a balancing of the Twenty-First Amendment and the Commerce Clause should be considered, it is readily apparent that the court below erred in its construction of a state's "core powers" under the Amendment that are to be given precedence over the Commerce Clause.

In its brief discussion of "core powers," the court below erroneously dismissed virtually out of hand the notion that Michigan's direct shipment ban promotes "temperance, ensuring orderly market conditions, and raising revenue" which are the state's "core powers" under the Twenty-First Amendment that this Court has long recognized. *North Dakota v. United States*, 495 U.S. 423, 432 (1990).

Other courts have also shed light on a state's "core powers." For instance, mere regulation of the sale of alcohol beverages is not sufficient to overcome a Commerce Clause challenge; a state's regulation "must effect the structure of the state liquor distribution system." *Pete's Brewing Co. et al. v. Whitehead*, 19 F.Supp.2d 1004, 1020 (W.D.Mo. 1998).

There can be no question that Michigan's decision to prohibit the direct shipment of alcohol beverages from a location outside of the state to consumers within the state is

an integral part of the structure of the liquor distribution system that the state has chosen to implement. The sale of alcohol beverages does not take place in a free and unregulated market. Buyers of alcohol beverages must be twenty-one years of age or older. Sellers are limited to those who have been licensed by the state after an exhaustive check of their background. Many licensed sellers, especially those at the production or wholesale level, are frequently required to remit excise taxes to the state and licensed retailers are required to collect and remit applicable sales taxes when the product is transferred to the ultimate consumer. Many jurisdictions (e.g., cities and counties) have opted to be totally "dry," prohibiting the sale of alcohol beverages altogether.

To strike down a state's statute as an impermissible burden on interstate commerce outside of the state's "core powers" under the Twenty-First Amendment would undermine a state's ability to structure any kind of distribution system, and lead to a totally unregulated market in alcohol beverages. *Every* regulation of in-state producers and sellers would have to be applied equally, and could lead to virtually unrestricted trade in alcohol beverages, not only to consumers, but to in-state retailers as well. If out-of-state sellers are permitted to ship into a state directly to the state's consumers, the state will lack the ability to effectively enforce its laws governing age of purchaser, background of sellers and collection of revenue, all of which are central to the system of distributing and selling alcohol beverages.

Michigan has not rendered it impossible for out-of-state vendors to reach its consumers. It has merely structured a system—and done so within the parameters permitted under the Twenty-First Amendment—that requires licensing and tax collection. Out-of-state vendors who wish to reach Michigan consumers may do so within the regime laid out by the state.

While some may believe that there is a less intrusive way for a state to regulate the importation of alcohol beverages

into its borders, the Twenty-First Amendment clearly gives the state legislature, and not the courts, the power to determine what kind, if any, importation to allow, and under what circumstances. This Court should not now undermine the plain meaning of the Twenty-First Amendment and its own long-standing interpretations of that Constitutional provision by the judicial insertion of conditions that have not heretofore been recognized.

## III. EVEN IF ONE ASSUMES THAT THE COMMERCE CLAUSE "TRUMPS" THE POWER ACCORDED TO THE STATE UNDER THE TWENTY-FIRST AMENDMENT, CONGRESS HAS UTILIZED ITS COMMERCE CLAUSE AUTHORITY TO DELEGATE CONTROL TO THE STATES

There is yet another reason, however, why Michigan's regulatory approach must be permitted to stand. Even if one accepts the reasoning of the court below, which the *amici curiae* believe is erroneous, one is left with Congress' utilization of its interstate commerce power in the Webb-Kenyon Act.

As has been indicated previously, that Act both pre-dates and post-dates adoption of the Twenty-First Amendment. Its purpose was unmistakably clear: "to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in states contrary to their laws." *Clark Distilling Co.*, supra.

Placed in the context of the earlier Wilson Act, the Webb-Kenyon Act represents a "further surrender to the states of the constitutional power of Congress to regulate interstate commerce in intoxicating liquors." *Dugan v. Bridges*, 161 F.Supp. 694, 704 (D.N.H.), appeal dismissed 300 U.S. 684 (1936). The Act shows an intent to give the states an "entirely free hand" in regulating the importation of alcohol beverages,

*Id.*, and there appears to be no prohibition against discrimination between liquors produced within the state and those produced outside the state. Put another way, the Act sanctions differential treatment of sellers, depending on their location.

The re-enactment of the Webb-Kenyon Act in 1935, subsequent to the adoption and implementation of the Twenty-First Amendment, underscores the principle that the Amendment does not withdraw from the states the power surrendered to them by the passage of the Act, regardless of whether one views the Act as a power abdicated that previously had been exercised by Congress, or as one having always been retained or reserved under the police powers of a state. *Id.* at 707.

The chronological timing of Congress' action in re-enacting the Act subsequent to the Twenty-First Amendment and its clear language indicate that, notwithstanding any other Commerce Clause analysis, Congress *did* intend to allow the states a free hand to regulate, or even prohibit, the interstate shipment of alcohol beverages into their borders.

To hold otherwise would render the Act and more than a century of Congressional pronouncements on the power of states a nullity.

While a balancing test against the Commerce Clause may be appropriate in certain instances of state enactments arguably supported by the power bestowed under the Twenty-First Amendment—a balancing test that, as stated, the *amici* do not believe is appropriate here—there can be no balancing test in construing what, in effect, is the grant of authority to the states under the Webb-Kenyon Act. Congress clearly determined to cede a portion of the federal government's interstate commerce authority to the states, and whether one agrees with the manner in which the state has exercised its authority or not, the clear result must be a deferral to

state action in the area of regulating importation of alcohol beverages.

There is nothing more basic to the structure of a state's alcohol beverage distribution system than the ability to determine under what conditions the product may be brought into the state. Alcohol beverages are one of a handful of products (tobacco and firearms being two others) that the government has determined warrant special treatment by means of controlling who may sell and who may purchase the product. There is not now, nor has there been for more than 150 years a "free" market in alcohol beverage distribution and sale. To disallow Michigan's (and other states') lawful attempt to control and regulate the distribution of this product would mean that virtually no importation regulation would be allowed to stand, leading to the uncontrolled and uncontrollable distribution of alcohol beverages.

This case is not about whether direct shipping of alcohol beverages to consumers should be allowed or prohibited. It is about the right of each state, acting pursuant to the Twenty-First Amendment, to decide for itself how it wishes to deal with its alcohol beverage distribution system.

Alcohol beverages should not be turned into the functional equivalent of polo shirts or blue jeans merely because a trier of fact believes there is a better way to regulate the product's flow.

## CONCLUSION

For the reasons set forth herein, the decision of the Sixth Circuit should be overturned and the case remanded for further proceedings not inconsistent with the decision herein. The decision of the Second Circuit in a companion case should be upheld.

Respectfully submitted,

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**On Writs of Certiorari to the United States Courts of Appeals for the Sixth Circuit**

## BRIEF OF NATIONAL BEER WHOLESALERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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## QUESTION PRESENTED

Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of Section 2 of the Twenty-first Amendment?

## PARTIES TO THE PROCEEDINGS

Petitioners, Defendant-Appelles below, are State of Michigan officials including the Governor, the Michigan Attorney General, and the Chair of the Liquor Control Commission (hereafter collectively referred to as "Michigan" or the "State"). The current holders of those offices have been substituted as parties for the former office holders pursuant to Sup. Ct. R. 35.3.

Petitioner, intervening Defendant-Appelle below, is the Michigan Beer & Wine Wholesalers Association ("MB&WWA"), a trade association of the Michigan beer and wine wholesalers that intervened as a defendant in the district court.

Respondents, Plaintiffs-Appellants below, include Eleanor Heald, Ray Heald, John Arundel, Karen Brown, Richard Brown, Bonnie McMinn, Gregory Stein, Michelle Morlan, William Horwath, Margaret Christina, Robert Christina, Trisha Hopkins, Jim Hopkins and Domaine Alfred, Inc. The thirteen individual parties are Michigan residents who are wine connoisseurs, wine journalists, and wine collectors. Respondent Domaine Alfred, Inc. is a California winery.

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IN THE

# Supreme Court of the United States

Nos. 03-1116 & 03-1120

JENNIFER M. GRANHOLM, *et al.*,
*Petitioners*,

v.

ELEANOR HEALD, *et al.*,
*Respondents*.

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,
*Petitioner*,

v.

ELEANOR HEALD, *et al.*,
*Respondents*.

**On Writs of Certiorari to the United States Courts of Appeals for the Sixth Circuit**

## BRIEF OF NATIONAL BEER WHOLESALERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

## INTEREST OF AMICUS CURIAE

Since 1938, the National Beer Wholesalers Association ("NBWA") has served as the national membership organization of the beer wholesaling industry representing over 2,200 licensed beer wholesalers.[1] Its members reside in all

[1] This *amicus curiae* brief filed in support of the Petitioners was funded solely by the National Beer Wholesalers Association and authored solely

fifty states. In 1997, U.S. beer wholesaler direct sales reached $30.5 Billion Dollars. Beer wholesalers employed 92,860 individuals and paid $3.4 Billion Dollars in wages. The total economic activity directly generated by beer wholesalers was $8.2 Billion Dollars. The total state and local taxes paid directly by beer wholesalers was $2.4 Billion Dollars. *See Beer Wholesalers: Their Role and Economic Performance*, at 46-47 (3d ed. 1999).

The economic activity of distributing beer stimulates other activity in the economy. Every dollar spent by wholesalers to buy such things as vehicles, equipment, computers and other goods and services represents income to other industries. Taking into account the "multiplier effect", the total direct and indirect economic contribution of beer wholesalers nationwide in 1997 was as follows: 368,010 jobs created, $10.2 Billion Dollars in wages paid, $28.4 Billion Dollars in total economic activity created, and $4.0 Billion Dollars in state and local taxes paid. *Id.* at 47. Obviously, the economic contribution of beer wholesalers is even greater today.

This case implicates the essential interests of NBWA and its members. The Sixth Circuit decision in *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003) threatens to dismantle complex state regulatory systems governing alcoholic beverages that have worked remarkably well for over seventy (70) years. Through these delicately balanced and historically tested regulatory schemes, states have addressed several fundamental interests: preventing illegal sales to minors, inhibiting overly aggressive marketing and consumption, collecting taxes, creating orderly distribution and importation systems, and preventing a recurrence of the problems that led to the enactment of National Prohibition.

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by counsel for the National Beer Wholesalers Association. This brief is filed with the written consent of all parties, evidence of which is submitted with this brief.

Specifically, the *Heald* decision puts at risk the requirement that all imported alcoholic beverages be delivered to an in-state licensee, thereby assuring effective regulation. Ordinarily, wholesalers are the in-state licensed entities through which imported alcoholic beverages must pass. Wholesalers pay excise taxes on imported product and retain records of their sales to retailers, thereby creating a transparent and accountable distribution system. They have invested large sums in creating these distribution systems in a highly regulated environment. These investments are jeopardized if the regulatory playing field is tipped against in-state licensees and out-of-state entities are permitted to ship directly to consumers.

## SUMMARY OF ARGUMENT

Intoxicating liquor is a unique product in American law. The detrimental impacts on individuals, families, and society as a whole that result from intemperate or underage consumption of intoxicating liquors are dramatically different from those related to the use of other products, whether measured by scale, severity, nature or remediability. As a consequence, government has attempted to mitigate these impacts through regulation. Indeed, intoxicating liquor has always been, and remains, one of the most heavily regulated products in the country. Localities and states have enacted a variety of restrictions on the manufacture, distribution and sale of intoxicating liquor. No other product has been the subject of one, let alone two, Constitutional Amendments: the first was the Eighteenth Amendment, which established National Prohibition and the second was the Twenty-first Amendment, which returned primary responsibility for alcohol regulation to the states. Then, as now, community norms and standards across the country differ widely regarding intoxicating liquors. This fact underscores the soundness of the Constitutional decision to rest regulatory authority primarily at the state and local level.

Since passage of the Twenty-first Amendment over seventy (70) years ago, this Court consistently has reaffirmed the right of states to control and regulate the production, shipment and sale of intoxicants within their borders. A review of the history of the Twenty-first Amendment, the Webb-Kenyon Act, and cases arising thereunder demonstrates that states are at liberty to regulate intoxicating liquor free from Commerce Clause limitations. In *Heald*, Respondents' entire constitutional challenge rests upon the argument that Michigan's different treatment of wineries with an in-state presence (which are subject to the State's regulatory powers) from those without such a presence (which are *not* subject to the state's regulatory powers) violates the dormant Commerce Clause. This challenge simply is not cognizable.

The *Heald* decision destroyed a keystone of the State's regulatory power: the right under the Twenty-first Amendment to control the importation of intoxicating liquor into the State and insist on importation and distribution through licensed entities with a physical presence in the State. Without apparent regard to the consequences of its decision, the *Heald* case made a Trojan Horse of one minor Michigan statutory provision which permits in-state wineries (which are subject to the licensing authority of the State), but not out-of-state wineries (which are outside the regulatory reach of the state), to ship direct to consumers, and thereby toppled a comprehensive three-tier system governing the distribution of intoxicating liquor.

Furthermore, the broad ruling not only undermines effective regulation, but also discriminates against licensed in-state wholesalers and retailers, since they, unlike unlicensed out-of-state suppliers, are subject to enforceable regulations and taxation. In doing so, the Sixth Circuit decision ignored (or at least rendered irrelevant) the Twenty-first Amendment (which represents a national consensus reached by the

American people just seventy years ago), a long line of decisions by this Court recognizing a state's fundamental and constitutional right to regulate alcoholic beverages, and an Act of Congress (the Webb-Kenyon Act) which explicitly grants states that right.

## ARGUMENT

### I. LIQUOR REGULATION PRIOR TO PROHIBITION.

Intoxicating liquor never has been treated like other products either by society or government. Over the course of our nation's history, public tolerance and the degree of regulatory control has vacillated between a view of alcohol as a mere article of commerce and a view of alcohol as a dangerous intoxicating beverage. The nineteenth century saw several waves of temperance activity with both social and political components. This activity led to greater regulation of intoxicating liquors. At times and in some parts of the country, the manufacture and sale of intoxicating liquor was banned, public dispensaries were established, and sales outlets were licensed, restricted and carefully regulated.

The evolution of our commercial infrastructure has led to legal challenges to existing liquor regulatory regimes. In the late nineteenth century, improvements in transportation, in particular the growth of railroads, and the concomitant expansive development of the dormant Commerce Clause doctrine gave rise to lawsuits which contested the constitutionality of state statutes and ultimately undermined the effectiveness of state regulatory efforts. The Court in *Bowman* and *Leisy* narrowly circumscribed the power of states to regulate the importation of intoxicating liquors. *See Bowman v. Chicago & NW Railway Co.*, 125 U.S. 465 (1888) (the Court struck down a state law which restricted the importation of intoxicating liquor to those possessing a permit); *Leisy v. Hardin*, 135 U.S. 100 (1890) (the Court held

that intoxicating liquor shipped into the state remained an article of "interstate commerce", immune from state regulation, as long as it remained in its original package). *Bowman* and *Leisy* represent a short-lived, jurisprudential detour from the subsequently established constitutional principle that intoxicating liquor is unlike other products and is not subject to dormant Commerce Clause analysis.

The crippling of state regulation by the Court in the *Bowman* and *Leisy* decisions provoked a congressional response, ending "dormacy" of federal regulations and permitting state regulation of importation. Congress passed the Wilson Act, 27 U.S.C. § 121 (1890), declaring that, upon arrival in the state, the sale, distribution and transportation of intoxicating liquor was subject to state regulation. In *Rhodes v. Iowa*, 170 U.S. 412 (1898), however, the Court narrowly construed the Wilson Act and concluded that the dormant Commerce Clause prohibited state regulation of direct shipments to in-state consumers by out-of-state distributors. As a result, railway express began to function as retail outlets. Congress responded with the passage of the Webb-Kenyon Act, 29 U.S.C. § 122 (1913), which gave the states power to prohibit the sale, distribution, transportation or importation of intoxicating liquor into the state in violation of its laws.[2] There could not have been a clearer expression by Congress of its intent to ensure that the state be the focus of control regarding intoxicating liquor.[3] The risk of discriminatory

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[2] In vetoing the Bill, President Taft described it as permitting "the states to exercise their old authority, before they became states, to interfere with commerce between them and their neighbors." The veto was swiftly overridden. *See* 49 Cong. Rec. 4292.

[3] As originally reported by the Senate Committee, the Webb-Kenyon Act (Senate Bill 4043) included as Section 2 the explicitly anti-discriminatory language of the Wilson Act (i.e. states may not discriminate against out-of-state suppliers, importers or wholesalers with regard to the regulation of intoxicating liquor). 49 Cong. Rec. 2687. This Section was eliminated from the final Bill. Clearly, this evidences the

legislation was outweighed by the desire to insure effective state regulation. The constitutionality of the Webb-Kenyon Act was upheld in 1917 in *Clark Distilling Co. v. Western Maryland Ry Co.*, 242 U.S. 311 (1917).

## II. PASSAGE OF THE TWENTY-FIRST AMENDMENT.

In response to a national temperance movement, the Eighteenth Amendment, establishing National Prohibition, was passed in 1919. That "noble experiment" lasted just fourteen (14) years. The Twenty-first Amendment, enacted in 1933, marked the abandonment of the effort to have a national policy prohibiting manufacture and sale of alcoholic beverages. The failure of the National Prohibition illustrated that noble motives were insufficient and, without broad support in public opinion, were ineffective and even destructive of the belief in the rule of and respect for law. Regulation of intoxicating liquor was to be undertaken at the level of government at which it was able to obtain broad support. In the future, primarily state, not national, regulation was to govern intoxicating liquors.

The ratification of the Twenty-first Amendment represented a constitutional commitment to make permanent the policy behind the Webb-Kenyon Act: that the state be the focus of intoxicating liquor control. As observed by the

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intent of Congress to grant states the power to regulate intoxicating liquors even where it may result in the possibility of differential treatment between in-state and out-of-state vendors. *See Dugan v. Bridges*, 16 F. Supp. 694 (D. N.H. 1936) ("[The Webb-Kenyon] Act in its original form contained the same language that was used in the Wilson Act to prevent discrimination against out-of-state production. *See* 49 Cong. Rec. p. 1687. In the act as finally posed the restrictive language does not appear. Its omission seems important. It shows intent to give the states an entirely free hand in regulating the importation and transportation of liquor.")

*Swedenburg* court, Section 2 of the Twenty-first Amendment "effectively constitutionalizes most state prohibitions regulating importation, transportation, and distribution of alcoholic beverages from the stream of interstate commerce into the state." *Swedenburg v. Kelly,* 358 F.3d 223, 232 (2d Cir. 2004) (quoting in part *Craig v. Boren*, 429 U.S. 190, 205-206 (1976)). Expressed in another way, Section 2 grants "the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.* 445 U.S. 97, 110 (1980).

As originally proposed, Section 3 of the Twenty-first Amendment would have given Congress concurrent power to regulate sales. That section was eliminated. At the time, Senators Blaine and Wagner explained that Section 3 would have been inconsistent with Section 2.

Section 2 was to return effective regulatory power to the states. The drafters of the Twenty-first Amendment, like the drafters of the Webb-Kenyon Act, did not wish to encourage discriminatory legislation. They were, however, prepared to endure it to assure that state regulation of intoxicating liquor would not be undermined. Prior to its consideration by the House, Congressman Lea objected to Section 2 because it would protect "unwise" or "improvident" state liquor laws. 76 Cong. Rec. 2776 (House)(1933). In submitting this language to state conventions, Congress believed that the goal of ensuring effective state regulation of intoxicating liquors was paramount to the risk that states may enact laws that some may deem to be unwise or imprudent. The Twenty-first Amendment was intended to ensure that each state was endowed with the power to regulate independently intoxicating liquors in accordance with "local sentiment and local habits" *see, e.g.* 76 Cong. Rec. 4146 (1933) and to restore to the states "absolute control in effect over interstate commerce

affecting intoxicating liquors which enter the confines of the states", *see, e.g.*, Comments of Senator Blaine, 76 Cong. Rec. 4143 (1933).[4]

The purpose and effect of the Twenty-first Amendment was to free states from the limits imposed by the dormant Commerce Clause regarding the regulation of importation, distribution and sale of intoxicating liquors. While judicially created limits on state regulation over interstate commerce of other products may have made sense, the need to create a "safe harbor" for the states' enforcement authority over intoxicating liquors was primary.[5]

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[4] The Senate twice was presented with language limiting Section 2 of the proposed Twenty-first Amendment to the protection of "dry" states. The proposal twice was rejected. The first version, of what became the Twenty-first Amendment, was proposed in December, 1932, and contained a clause protecting states that prohibited the manufacture and sale of intoxicating liquor. The Senate Judiciary Committee, in its report, changed the language to that which was ultimately enacted as Section 2. The full Senate had an opportunity to reconsider the expanded scope of paragraph 2 when Senator Glass proposed that the amendment be limited to states prohibiting manufacture and sale of intoxicating liquors, with the Commerce Clause continuing to constrain alcoholic beverage legislation in states permitting such manufacture and sale. The Glass amendment was rejected. 76 Cong. Rec. 4219, 4229 (1933). This history, in great detail, was brought to the attention of the Supreme Court when it considered *Young's Market*. The Court unanimously rejected an appeal to history not because history pointed in a direction the Court did not wish to go, but because the Court considered it unnecessary and unwise. Long before, this Court had made clear that the effect of the Wilson Act was not limited to states that prohibited the manufacture and sale of intoxicating liquor. *Vance v. Vandercook*, 170 U.S. 438, 447 (1898); *Reymann Brewing Co. v. Brister*, 179 U.S. 445, 454-55 (1900); *Pabst Brewing Co. v. Crenshaw*, 198 U.S. 17, 29 (1905).

[5] A political scientist noted in 1934: "Those who view with apprehension the centralizing tendencies of New Deal legislation may find solace in the antithetical development in the field of liquor control. The uniform control achieved by the Eighteenth Amendment was the object of applause until its evident unworkability was discovered. It is one of the

After Repeal, "true temperance" meant sustainable moderation; effective control meant what could be enforced. Raymond B. Fosdick & Albert L. Scott, *Toward Liquor Control*, at 7 (1933). The regulation of intoxicating liquor struggled to reconcile a tension caused by two contrasting images: a legitimate commodity, manufactured and sold by willing producers versus a dangerous intoxicating beverage, capable of being abused. Alcohol was to be available, but

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paradoxes of American politics that we have destroyed the possibility of centralization in the field of liquor control at the same time that we have been attempting to achieve greater centralization in a number of activities hitherto believed to be completely in the field of state authority." Dayton E. Heckman, "Contemporary State Statutes for Liquor Control," 28 Am. Poli. Sci. Rev. 628 (1934).

In 1939, then Solicitor General Robert Jackson (who was one of the primary proponents of the creation of a national market and of the dormant Commerce Clause doctrine) stated: "The Twenty-first Amendment to the Constitution, which repealed prohibition, provided that the transportation into any State of intoxicating liquors, in violation of the laws of such State, is prohibited. Thus an exception was made to the generally exclusive power of Congress, and control of commerce between States in intoxicating liquors was handed back to the States of destination. The purpose, and I intend no criticism of it, was to protect each State from importations that would defeat its own policy of dealing with the moral and social problems incident to the liquor traffic.

The power thus given to protect their social policy many States turned, under pressure from local liquor interests, to the protection of home industry. Local beer is given an effective tariff protection by imposing higher sales taxes on out-of-state beer, or special license fees and restrictions are placed on those who sell it. The States thus discriminated against have then responded with all of the weapons of modern tariff reprisal, such as retaliatory taxes, and inspections and partial and complete embargoes. A beer war has involved many States and perverted the purpose of the Amendment. Such legislation applied to intoxicating liquor, however, is quite properly sustained by the Supreme Court." Jackson, "Trade Barriers—A Threat to National Unity," in Trade Barriers Among the States: The Proceedings of the National Conference on Interstate Trade Barriers, April 5,6,7, 1939 (Chicago).

rigidly licensed. Unrestricted trade was not tc be permitted; low prices and wide availability were rejected as categoric definitions of the public good. [6] Disparate treatment of imported and in-state intoxicating liquors was to be permitted.

## III. JUDICIAL INTERPRETATION OF THE TWENTY-FIRST AMENDMENT.

Section 2 of the Twenty-first Amendments provides as follows:

> The transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

"The Amendment was not a narrow legislative delegation of federal authority; it was the will of a nation speaking through its constitutional process." *Swedenburg v. Kelly*, 358 F.3d 223, 227 (2d Cir. 2004). Moreover, this national consensus was achieved just seventy years ago. The plain language of the Amendment exclusively reserves to the states the right to regulate "transportation or importation" of intoxicating liquors. Nothing in the language of the Amendment

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[6] After passage of the Twenty-first Amendment, states, for the most part, chose to follow one of two models in order to curb increased sales, abusive sales practices, and excessive consumption: state monopoly of the distribution chain or the three-tier system. The three-tier system of distribution prevails today in a majority of states. *See Bainbridge v. Bush*, 148 F. Supp. 2d 1306, 1308 (M.D. Fla. 2001), vacated by *Bainbridge v. Turner*, 311 F.3d 1104 (11th Cir. 2002). The three-tier system is designed to prevent vertical integration in the liquor industry by "tied houses." Direct links between manufacturers and retailers, and disproportionate influence between the two, has historically led to increased sales, abusive sales practices and excessive consumption. The three-tier system interjects checks and balances by separating producers from consumers through a distinct, mandatory, transparent and accountable distribution system. *See S.A. Discount Liquor, Inc. v. Texas Alcoholic Beverage Comm'n*, 709 F.2d 291, 293 (5th Cir. 1983).

limits the states' power to regulate "transportation and importation." As such, it is clear from "the scope of the Twenty-first Amendment's grant of authority . . . that it is exempted from the effect of the dormant commerce clause." *Id.* at 231 (citing *Craig v. Boren*, 429 U.S. 190, 206 (1976)).

Shortly after its enactment, this Court recognized the broad powers conferred upon the states by the Twenty-first Amendment. *See e.g., State Board of Equalization v. Young's Market Co.*, 299 U.S. 50 (1936) (upholding a statute that imposed a license fee on beer importers); *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938) (upholding limitation on the types of blended spirits imported into the state, which was not imposed upon those produced in state); *Ziffrin v. Reeves*, 308 U.S. 132 (1939) (upholding regulation of the exportation of alcoholic beverages out of the state). Specifically, these cases upheld the states' power to regulate intoxicating liquor even when it burdens out-of-state interests vis-à-vis in-state interests. *Id.* The common thread running through these decisions is the recognition that control of importation is the essential component of the states' licensing and regulatory authority and that the Twenty-first Amendment insulates that authority from a dormant Commerce Clause challenge.[7]

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[7] This Court refused to adopt a constitutional analysis which inquires into the underlying purposes of a state statute and determines whether regulatory or protectionist aims predominate. *See, Indianapolis Brewing Co. v. Liquor Control Commission*, 305 US 391 (1939); *Finch v. McKittrick*, 305 U.S. 395 (1939). These cases were challenges to retaliatory (or "protective", as Justice Brandeis suggested they might be termed) statutes limiting or banning importation of alcoholic beverages from states which themselves, in the eyes of the "protective" state, discriminated against or burdened importations. The burdens cited varied from excise tax differentials, to import fees, to requirements that importers sell only to in-state licensed wholesalers.

The Court might have rejected all such legislation or permitted it only when imposed against protectionist rather than regulatory statutes, but either choice would have compelled the Court to evaluate the statute being

The Court, however, did not declare state regulation of intoxicating liquor free from all limitations. Justice Brandeis wrote in *Young's Market*: "The plaintiffs insist that to sustain the exaction of the importer's license fee would involve a declaration that the Amendment has, in respect to liquor, freed the states from all restrictions upon the police power to be found in other provisions of the Constitution. The question for decision requires no such generalization." 299 US 59, 64 (1936). The Court subsequently articulated such limitations. *See Craig v. Boren*, 429 U.S. 190, 206 (1976) (Equal Protection Clause); *See Constantineau v. Wisconsin*, 400 U.S. 433 (1971) (Due Process Clause); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 941 (1982) (Establishment Clause); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (First Amendment). No constitutional provision, other than the Twenty-first Amendment, is at issue in this case.[8]

Similarly, the Court has made it clear that states may not attempt to regulate commercial activity extraterritorially. *See Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986) (an affirmation statute that controlled the price of intoxicating liquor in other states);

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retaliated against. If the Court rejected retaliation, but did not evaluate the statute which provoked the prohibited response, there would be neither a political nor a judicial remedy against allegedly protectionist legislation. Instead, the Court chose to permit protective statutes, and avoid judicial intrusiveness into the myriad details of complex state regulatory systems.

The Court left trade disputes involving intoxicating liquors to be resolved through the political process. By the end of the 1930's, states, generally speaking, were no longer enacting protectionist laws regarding intoxicating liquor. Joseph Kallenbach, "Interstate Commerce in Intoxicating Liquors under the Twenty-first Amendment," 14 Temple L.Q. 474, 488 (1940). The problem did not disappear, but, like alcohol abuse, it was controlled.

[8] Dormant Commerce Clause analysis is not relevant because of the passage of the Twenty-first Amendment and congressional enactment of the Webb-Kenyon Act.

*Healy v. Beer Inst., Inc.*., 491 U.S. 324 (1989) (striking down a price affirmation statute with extraterritorial effect);[9] *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964) (invalidating New York's attempt to close down an airport duty free shop, whose products were delivered to the ultimate consumer and whose products were used abroad). Again, no claim is being made here that Michigan is attempting to regulate extraterritorially.

Only once has this Court applied dormant Commerce Clause analysis to a regulation arguably involving the importation of alcoholic beverages. In *Bacchus Imports, Ltd. v. Dias*, 408 U.S. 263 (1984), Hawaii imposed a tax on intoxicating liquors but exempted from taxation two locally produced products, ti root brandy and pineapple wine. The court struck down the Hawaii tax on the basis that it was intended to "favor local liquor industries" and therefore was preempted by the "strong federal interest in preventing economic Balkanization." *Id.* at 276. However, the exemptions had explicitly been passed and were explicitly defended by the state as exclusively motivated by a desire to aid local

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[9] Justice Scalia, concurring in *Healy*, stated that the statute's "discriminating character eliminates the immunity afforded by the Twenty-first Amendment. *Id.* at 344. Importantly, he did not find that any difference between the treatment of imports and the treatment of in-state products was unconstitutionally protectionist and unprotected by the Twenty-first Amendment. "*Every* use of §2 could be called "discriminatory" in the sense that plaintiffs use that term, because every statute limiting importation leaves intrastate commerce unaffected." *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 853 (7th Cir. 2000). Connecticut did not treat out-of-state suppliers differently from in-state suppliers. It distinguished brewers, whether located in or out-of-state, who sold only in Connecticut, from those, whether located in or out of state, who sold both in Connecticut and in neighboring states. Justice Scalia objected to differential treatment of interstate commerce, not differential treatment of importation. *Healy v. Beer Dist.*, 491 U.S. 324, 344 (1988).

industry. The Court stated that "[t]he central purpose of [Section 2 of the Twenty-first Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition" at *Id.* Hawaii insisted that it had no other purpose than a subsidy for the exemption. Official Transcript Proceedings before the Supreme Court of the United States. January 11, 1984, p. 35. Significantly, the relevance of the Webb-Kenyon Act was never argued to the Court. Furthermore, the Twenty-first Amendment was not even cited by Hawaii until it submitted its brief to this Court. Writing for the majority, Justice White found this 'belated" argument unconvincing.[10]

The Court remanded the case for a determination of remedy. Reimbursement, if ordered, would function like a fine. It would not disable Hawaii's future capacity to regulate the importation, distribution, and sale of intoxicating liquors.[11]

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[10] Three current members of the Court sat on the *Bacchus* case and all dissented on the basis that the "commerce clause claim is squarely foreclosed by the Twenty-first Amendment to the United States Constitution." *Bacchus v. Dias*, 468 U.S. 263, 278 (1894) (J. Stevens with J. Rehnquist and J. O'Connor dissenting). In recognition of the fact that hard cases make bad law, *Bacchus* should at the least be confined to its unique facts and procedural history. At best, the case represents the Court's acknowledgement that there was not even a colorable attempt by the state of Hawaii to justify the exemption on any grounds other than naked economic protectionism nor was there any attempt below to even argue the Twenty-first Amendment. Alternatively, the case stands for the proposition that it is constitutionally impermissible to distinguish between in-state and out-of-state suppliers for the sole purpose of raising revenue, intentionally creating the functional equivalent of a tariff, but constitutionally permissible when a purpose is to control importation and transportation when the intoxicating liquor is destined for delivery or use within the state.

[11] The author of the dissent in *Bacchus* later lamented, dissenting in *City of Newport v. Iacabucci*, 479 U.S. 92, 98 (1986): "In recent years, however, the Court has completely distorted the Twenty-first Amend-

Unfortunately, even if it was not wrongly decided, *Bacchus* has been misinterpreted by lower courts and cited for the proposition that it represents a pendulum swing by the Court from a broad to a narrow reading of the Twenty-first Amendment. *See, e.g., Heald v. Engler*, 342 F.3d 517, 523-24 (6th Cir. 2003); *Dickerson v. Bailey*, 336 F. 3d 388, 400 (5th Cir. 2003); *Beskind v. Easley*, 325 F.3d 506, 514 (4th Cir. 2003); *Bainbridge v. Turner*, 311 F. 3d 1004, 1108 (11th Cir. 2002). That faulty reading has led those lower courts to apply traditional dormant Commerce Clause analysis incorrectly to state regulations governing the importation, sale and distribution of intoxicating liquors.[12]

For reasons discussed above, however, *Bacchus* can *not* be read so broadly and does *not* stand for the proportion that the Court had embraced a sea change in the interpretation of the

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ment. It now has a barely discernible effect in Commerce Clause cases . . ." J. Stevens supported his conclusion by citation to *Healy* and to *Bacchus*, which did not have such a devastating effect. Justice Stevens' gloomy assessment was perhaps colored by his disapproval of the path taken by this Court in *California v. Larue*, 409 U.S. 109 (1973) and continued in *City of Newport*. The path, of course, was decisively rejected in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

[12] The *Heald, Dickerson, Beskind* and *Bainbridge* courts employed the traditional two step dormant Commerce Clause analysis. First, the courts examined whether the regulation in question "affects interstate commerce in a manner either that (i) discriminates against interstate commerce, or (ii) imposes burden on interstate commerce that are incommensurate with putative local gains." *Swedenburg v. Kelly*, 358 F.3d 223, 230 (2d Cir. 2003) (quoting *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 208 (2d Cir. 2004)). Second, concluding that the regulation in question failed to pass muster, the courts examined whether the regulation in question implicated one of the Twenty-first Amendment's "core concerns". If so, it may be "saved", notwithstanding its discriminatory effect. *Id.* As noted by the *Swedenburg* court, however, this analysis ignored (or at least rendered irrelevant) the express language of the Twenty-first Amendment, the Webb-Kenyon Act, and numerous decision of this Court. *Swedenburg*, at 231.

Twenty-first Amendment. *Bacchus* presents an unusual set of facts. The state insisted that its exclusive intent was to favor its own products in exempting them from an excise tax. This case simply did not implicate the state's interests under the Twenty-first Amendment. Certainly, no aspect of the ruling in this case provided a carte blanche for lower federal courts to recast Twenty-first Amendment analysis or discard state regulatory schemes governing the importation, sale and distribution of intoxicating liquor. Furthermore, as noted by the *Swedenburg* and *Bridenbaugh* courts, nothing in that case mandated dormant Commerce Clause or "core power" analysis when considering challenges to state importation regulation or to requirements that intoxicating liquors be distributed through in-state licensed entities. *See Swedenburg v. Kelly*, 358 F.3d 223, 236 (2d Cir. 2004); *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 851-54 (7th Cir. 2000), *cert. denied sub. nom., Bridenbaugh v. Carter*, 532 U.S. 1002 (2001).

This Court consistently has reaffirmed the right of states under the Twenty-first Amendment to control the importation of intoxicating liquor. In *North Dakota v. United States*, 495 U.S. 423 (1990), the court upheld labeling and reporting requirements for intoxicating liquor shipped to military bases, under concurrent jurisdiction. Justice Stevens wrote that "within the area of its jurisdiction, the state has 'virtually complete control' over the importation and sale of liquor and the structure of the liquor distribution system." *Id.* at 431; *see California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980); *see also Capital Cities Cable, Inc. v. Crisp*, 476 U.S. 694, 712 (1984); *California Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936)." He further noted that that "[i]n the interest of promoting temperance, ensuring orderly markets conditions, and raising revenue, the state established a comprehensive system for the distribution of liquor within its borders. That system is

unquestionably legitimate." *North Dakota v. United States*, 495 U.S. 423, 432 (1990) (citing *Carter v. Virginia*, 321 U.S. 131 (1994); and *State Board of Equalization v. Young's Market, Co.*, 299 U.S. 59 (1936))[13].

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[13] The Sixth Circuit dismissed as dictum the relevance of the language in *North Dakota*, describing state importation controls as being unquestionably legitimate, because the case involved a Supremacy Clause challenge. The *Heald* Court, however, failed to appreciate the basis for the *North Dakota* decision and the implications of that decision on a dormant Commerce Clause challenge to state importation controls.

The plurality concluded that there was no discrimination because the United States could, like all other retailers in North Dakota, purchase its imported intoxicating liquor from in-state licensed wholesalers. This conclusion presupposes that all other retailers were compelled to so purchase from in-state licensed wholesalers. If a retailer could buy directly from an out-of-state supplier, the terms of the transaction might be better than those available to the United States from the in-state wholesaler, thus making discrimination possible. Justice Scalia reached a similar result because he believed that the state, under the Twenty-first Amendment, could compel the United States, as well as all other retailers, to purchase intoxicating liquors only from licensed in-state wholesalers.

More recently, this Court has again recognized the states' power to control importation of intoxicating liquors. In *44 Liquormart, Inc. v. Rhode Island*, 517 U.S.484 (1996), this Court held that the Twenty First Amendment gave no authority to states to violate the First Amendment. The advertising restriction at issue was rejected because there was no evidence that it significantly advanced the state interest in temperance and because there were less restrictive alternatives available. These less restrictive alternatives were direct regulation of prices or taxation, as conceded by the state's own expert. Justice Stevens, joined by Justices Kennedy, Souter and Ginsburg at 1509 and Justice O'Connor joined by Chief Justice Rehnquist and Justices Souter and Breyer at 1521. The principal opinion, by Justice Stevens, also referred to the possibility of direct limitation of per capita purchases. None of these alternatives can be effectively implemented in the absence of a requirement that all intoxicating liquors sold or delivered for use within the state go through an in-state licensed entity.

## IV. THE STATE'S REGULATORY STRUCTURE THAT PERMITS IN-STATE WINERIES TO SHIP ALCOHOL DIRECTLY TO CONSUMERS BUT RESTRICTS OUT-OF-STATE WINERIES IS PERMISSIBLE UNDER SECTION 2 OF THE TWENTY-FIRST AMENDMENT.

Currently, there is a split among six Circuit Courts of Appeal regarding the central question presented on this appeal. Three circuits have invalidated state laws that prohibit out-of-state wineries (which are *not* subject to the regulatory reach of the state) to ship direct to consumers but permit in-state wineries (which are licensed and are subject to effective control by the state) to sell, under certain circumstances, direct to consumers. *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003); *Dickerson v. Bailey*, 336 F.3d 388 (5th Cir. 2003); *Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003). These three circuits, as well as the Eleventh Circuit, utilized traditional dormant Commerce Clause analysis in reaching their decisions.[14] In doing so, they ignored or misinterpreted

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[14] In *Heald* and *Dickerson*, the Sixth and Fifth Circuits respectively struck down the direct shipping prohibition in its entirety. *Heald*, at 527; *Dickerson*, at 409-410. In *Beskind*, the Fourth Circuit struck down only the in-state exemption and left "in place the three-tiered system that North Carolina had employed since 1937 and has given every indication it wants to continue to employ." *Beskind*, at 519. In *Bainbridge v. Turner*, 311 F.3d 1104 (11th Cir. 2002), the Eleventh Circuit vacated a summary judgment for the state and remanded on the issue of whether Florida's statutory scheme was closely related to the "core concern" of the Twenty-first Amendment of raising revenue or was a pretext for mere economic protectionism. *Bainbridge*, at 1104. The Eleventh Circuit made clear, however, that the standard to be met was far less than the least restrictive alternative. In dissent, Judge Roney stated: "In these credit card days of easy purchase by telephone and internet, this statute reflects the 'core' concerns of the Twenty-first Amendment that alcoholic beverages not be sold to underage consumers and not be sold effectively unregulated or untaxed. This court improperly treats as equal the prospective loss of a beverage license to an in-state firm and the loss of a Florida beverage

the Twenty-first Amendment, the Webb-Kenyon Act, 27 U.S.C. § 122, and numerous decisions of this Court, including, without limitation, *State Bd. Of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936), *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964) and *North Dakota v. United States*, 495 U.S. 423 (1990).

Two Circuits have upheld the differential treatment between in-state and out-of-state wineries noting that it was "a permissible expression of the state's authority under Section 2 of the Twenty-first Amendment." *Swedenburg v. Kelly*, 358 F.3d 223,231 (2d Cir.2004); *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000), *cert denied, sub. nom., Bridenbaugh v.* Carter, 532 U.S. 1002 (2001). Both the *Swedenburg* and *Bridenbaugh* courts rejected the contention that the express language of the Twenty-first Amendment was subordinate to the doctrine of the dormant Commerce Clause. *Swedenburg*, at 231; *Bridenbaugh*, at 849 ("This case pits the Twenty-first Amendment, which appears in the Constitution, against the 'dormant commerce clause', which does not"). They also rejected the argument that the Twenty-first Amendment only protects state regulation "that advance so-called core concerns." *Swedenburg*, at 233; *Bridenbaugh*, at 851. Accordingly, the *Swedenburg* and *Bainbridge* courts rejected as "flawed" the two-step approach embodied in traditional dormant Commerce Clause analysis that was applied by the other four circuits. *Swedenburg*, at 231; *Bridenbaugh*, at 853.

In a thoughtful and historically grounded analysis, the *Swedenburg* court upheld New York laws, which regulated the importation of intoxicating liquors by requiring that they pass through an in-state licensee. The *Swedenburg* court

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license to an out-of-state firm, if one is required at all. One would put the firm out of business, the other would simply restrict the market by a state." *Id.* at 1116.

noted that "[w]ith Prohibition's repeal, the drafters of the Twenty-first Amendment drafted Section 2 to allow states the authority to circumvent dormant Commerce Clause protections, provided that they were regulating the intrastate flow of alcohol." *Swedenburg*, at 237.

In reaching this conclusion, the *Swedenburg* court specifically recognized the importance of the requirement that all imported intoxicating liquors be delivered to an in-state licensee, thereby assuring effective regulation. This regulatory concern is unquestionably valid.

> Presence ensures accountability. Records of sales and compliance with New York's regulatory requirements must be available for inspection by SLA officials. Violations are subject to disciplinary measures carried out in New York, including fines imposed against the bond all license holders are required to post. New York treats wine importers the same as it treats internal sellers; all must either utilize the three-tier system or obtain a physical presence from which the state can monitor and control the flow of alcohol.

*Swedenburg*, at 237-238.

In contrast, the *Heald* and *Dickerson* decisions threaten to dismantle complex state regulatory systems governing intoxicating liquors that have worked remarkably well for over seventy (70) years. Through these delicately balanced and historically tested regulatory schemes, states have addressed several fundamental interests: preventing illegal sales to minors, reducing abuse of intoxicating liquors, inhibiting overly aggressive marketing, creating orderly distribution and importation systems, collecting taxes, and preventing a recurrence of the problems that led to the enactment of National Prohibition.

The *Heald* decision substantially undermines the effectiveness of Michigan's regulatory regime by proscribing the power to control importation. In Michigan, state law requires

that all intoxicating liquor must either be produced in-state by a licensed entity or be produced out-of-state and shipped in-state to a licensed entity. Either way, the source of the intoxicating liquor to be consumed in Michigan falls under the licensing and enforcement umbrella of the State. If that intoxicating liquor is produced, imported or sold in a manner inconsistent with state law, Michigan has created a transparent and accountable distribution system so that any such violation can be ascertained, punished, and deterred in the future. None of these regulatory functions can be effectively exercised over an unlicensed out-of-state entity. Relying upon inapposite dormant Commerce Clause analysis, the Sixth Circuit invalidated this regulatory regime because in-state wineries (which are licensed and subject to effective control by the state) may sell, under certain circumstances, direct to consumers while out-of-state wineries (which are *not* licensed and *not* subject to effective control by the state) must first sell to a licensed importer.

While this case may involve oenophiles, it is constitutionally indistinguishable from one involving spirits or beer. There is no distinction between the importation of a highly allocated cult wine and that of an alcopop or distilled spirits. How are regulators expected to police underage sales effectively when a resourceful teenager can order distilled spirits through the mail? A state cannot effectively hold an out-of-state licensed entity accountable for such a violation of state law. Is state regulation at risk because of the existence of brewpubs, since in-state suppliers are permitted to sell on-premise?

The logic of the opinions would seem to apply to importation controls that result in any difference in the regulatory treatment of an out-of-state or an in-state licensed supplier, of an out-of-state or in-state licensed wholesaler, or of an out-of-state or in-state licensed retailer, even where the purpose of that importation control is to ensure compliance

with state law by requiring that all importation be to a licensed entity physically present within the state. The licensed, physical presence of the source of the intoxicating liquor, be it manufacturer, importer, or wholesaler, is the cornerstone of an orderly, transparent, and accountable alcoholic beverage distribution system. The validity of such a system has never been questioned by this Court.

The Sixth Circuit also ignores the competitive advantage that its decision confers upon out-of-state suppliers. By effectively exempting out-of-state suppliers from the regulatory reach of the state, these suppliers are free to violate a state's laws without fear of consequences. Accordingly, the inequitable outcome of the decision will be that out-of-state suppliers are accorded a benefit not enjoyed by in-state suppliers, while at the same time, states are hamstrung in the effective enforcement of their laws over out-of state suppliers.

In summary, Amicus Curiae NBWA urges the Court to reverse the *Heald* decision and affirm the *Swedenburg* decision. The history of the Twenty-first Amendment and a careful analysis of the Court's jurisprudence thereunder makes it clear that "a state is totally unconfined by traditional commerce clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders." *See, Department of Revenue v. James B. Bean Distilling Co.,* 377 U.S. 341, 344 (1964) (holding that the Twenty-first Amendment does not grant states the power to intrude upon the federal interest in regulating the importation of foreign intoxicating liquor).

Simply put, the Twenty-first Amendment grants the states "virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.,* 445 U.S. 97, 110 (1980). If no other constitutional provisions are at issue, and if the state is

not seeking to regulate intoxicating liquors extraterritorially (neither of which is at issue here), the state is at liberty to regulate intoxicating liquors free from dormant Commerce Clause limitations. As such, Michigan, as a proper exercise of its regulatory function, should certainly be able to condition a winery's ability to ship direct to consumers upon the receipt of a license and upon the establishment of a physical presence in the state. In practical terms, these requirements are essential to effective enforcement.

## V. THE *HEALD* DECISION DESTROYS THE KEYSTONE OF THE STATE'S REGULATORY POWER: THE RIGHT UNDER THE TWENTY-FIRST AMENDMENT TO CONTROL THE IMPORTATION OF INTOXICATING LIQUOR INTO THE STATE.

The disposition of this case requires an understanding of the underlying theory and history of alcohol regulation, the complexity and efficacy of the state's current regulatory structure, and the consequences of the lower court's ruling on Michigan's legitimate goals of preventing illegal sales to minors, reducing abuse of intoxicating liquor, inhibiting overly aggressive marketing, creating orderly distribution and importation systems, and collecting taxes. Consideration of these compelling concerns leads to but one conclusion: that the current regulatory system has worked remarkably well for over seventy (70) years and should not be discarded.

Following Prohibition, states generally followed one of two models in enacting intoxicating liquor regulations. A minority of states adopted some form of public monopoly. *See* George A. Shipman, *State Administrative Machinery for Liquor Control*, 7 Law & Contemp. Prob. 600, 612 (1940). While this model vested the most control in the state, it also involved the displacement of private operation by public operation. A majority of states elected to adopt a three-tier

system of distribution in their alcoholic beverage industry, preserving that degree of entrepreneurial autonomy that was consistent with comprehensive regulation.

To avoid the harmful effects of vertical integration in the alcohol industry, the three-tier system effectively restricts manufacturers, wholesalers, and retailers to one level of activity. Prior to Prohibition, large companies often controlled, through vertical and horizontal integration, both the production and sale of intoxicating liquors. The resulting "tied-houses" led to excessive retail capacity and cutthroat competition for market share, which, in turn, led to intemperate consumption as a consequence of excessive sales stimulation. The three-tier system eliminates the probability of "tied house" relationships or vertical integration. It also prevents companies with monopolistic tendencies from dominating all levels of the industry and assures that the source of distribution will have a licensed in-state presence. The three-tier system thus creates a transparent and accountable distribution system in the industry.

While each state has implanted its unique imprint on its three-tier system over the last seventy (70) years, the utility and effectiveness of the three-tier model has been well demonstrated. Before and during National Prohibition, abuse of intoxicating liquors was an acute problem. Since Repeal, it has been at worst a chronic one. The three-tier system has worked remarkably well and withstood the test of time. Furthermore, the need for and current relevance of the three-tier system is perhaps greater today than at any time in recent history. Public concern with both intemperate and underage consumption is obvious. The intoxicating liquor industry has experienced unprecedented consolidation in recent years, which makes vertical integration, with the attendant "tied house" evils, far more likely without appropriate controls. Such developments highlight the need for greater control of the productive and distributive channels of intoxicants, <u>not</u>

deregulation, and the need to protect state enforcement powers in order to curb excessive sales, abusive sales practices and intemperate consumption.

Article Four of Michigan's Constitution provides that "the legislature may by law establish a liquor control commission which, subject to statutory limitations, shall exercise complete control of the alcoholic beverage traffic within this state, including the retail sale thereof." Const. 1963, Act. 4, § 40. In accordance with the explicit power granted by the Twenty-first Amendment of the United States Constitution and Article Four of the Michigan Constitution, the Michigan Liquor Control Commission adopted a three-tier system. Generally speaking, the system requires consumers to purchase and receive intoxicating liquors from licensed in-state retailers; retailers to purchase and receive intoxicating liquors from licensed wholesalers; and wholesalers to purchase and receive intoxicating liquors from licensed manufacturers. Mich. Comp. Laws § 436.1203.

Michigan permits an exception to the direct shipping prohibition for licensed wineries with an in-state presence. These wineries (which are subject to the state's enforcement powers) may ship direct to consumers provided that they comply with all of the state's liquor laws. Mich. Comp. Laws § 436.113 (a) & 436.1203 (1)—(8). There is no similar exception for wineries, which do not have an in-state presence (and which are therefore not subject to the state's enforcement powers).

Michigan's different treatment of wineries with an in-state presence from those without such a presence clearly does not violate the United States Constitution. Control of importation is the essential component of the state's licensing and regulatory authority and the Twenty-first Amendment insulates that power from dormant Commerce Clause challenge and from a charge of "discriminatory" treatment.

The *Heald* decision eliminated this fundamental element of Michigan's "comprehensive system for the distribution of liquor within its borders." *See North Dakota v. United States*, 495 U.S. 423, 432 (1990) (citing *Carter v. Virginia*, 321 U.S. 131 (1994) and *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936)). Furthermore, the *Heald* court's broad ruling not only undermines effective regulation, but also discriminates against licensed in-state wholesalers and retailers, since they, unlike unlicensed out-of-state suppliers, are subject to enforceable regulations and taxation.

In *Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003), the United States Court of Appeals for the Fourth Circuit incorrectly applied dormant Commerce Clause analysis but did recognize and protect the integrity and efficacy of the North Carolina regulatory system. In *Beskind*, out-of-state wineries challenged, under the Commerce Clause, North Carolina's prohibition on the direct sale of wine to North Carolina residents by out-of-state wineries. The trial court in *Beskind* agreed with the out-of-state wineries that North Carolina's laws prohibiting direct wine sales by out-of-state wineries violated the Commerce Clause because North Carolina permitted in-state wineries to sell directly to consumers. At the request of the out-of-state wineries, the trial court enjoined North Carolina from enforcing its laws prohibiting direct sales of wine to North Carolina residents by out-of-state wineries.

On appeal, North Carolina argued that the trial court's remedy was inappropriate and that it should be permitted to cure the discrimination against out-of-state wineries by prohibiting in-state wineries from selling wine directly to consumers, thus preserving the comprehensive regulatory system. The Fourth Circuit agreed, specifically noting that the North Carolina three-tier system "furthers its Twenty-first Amendment interests in regulating the consumption of alcoholic beverages, enforcing a minimum age for the pur-

chase and consumption of such beverages, limiting the location from where they are sold, controlling the contents of such beverages, and collecting taxes in connection with their sale and distribution." *Id.* at 516.

In refusing to effectively dismantle this system, the Court further stated that:

> Additionally, North Carolina has maintained its ABC laws in implementation of the Twenty-first Amendment since 1937, shortly after the end of Prohibition, but only added the preference for local wineries over 40 years later, perhaps to promote its local wine industry but certainly not to relinquish its power under the Twenty-first Amendment. And even as it added that preference for local wineries, it did not exempt them from a substantial portion of the ABC laws. Moreover, it did not retreat from its general mandate that the ABC laws be "liberally construed to prohibit the transportation and importation of alcoholic beverages except as permitted by those laws.

*Id.* at 519.

Although the *Beskind* Court erred in its analysis of the Twenty-first Amendment, and an in-depth discussion of remedy is beyond the purview of this appeal, the *Beskind* case is important for its recognition that a narrow exemption contained in a state statute should not jeopardize an entire complex regulatory system that has worked remarkably well for over seventy (70) years.

## CONCLUSION

Based on the arguments and authorities set forth above, Amicus Curiae National Beer Wholesalers respectfully requests that this Court reverse the holding of the United States Court of Appeals for the Sixth Circuit in *Heald v.*

*Engler*, 342 F.3d 517 (6th Cir. 2003) and affirm the holding of the United States Court of Appeals for the Second Circuit in *Swedenburg v. Kelly*, 358 F.3d 223 (2d Cir. 2004).

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IN THE

# United States Supreme Court

GRANHOLM, et al. and MICHIGAN BEER & WINE WHOLESALERS ASS'N,

*Petitioners,*

*v.*

ELEANOR HEALD, *et al.*,

*Respondents.*

*On Writ of Certiorari To The United States Court of Appeals for the Sixth Circuit*

## BRIEF FOR WINEAMERICA, COALITION FOR FREE TRADE, FAMILY WINEMAKERS OF CALIFORNIA, STATE VINTNERS ASSOCIATIONS AND GRAPE GROWING ASSOCIATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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## QUESTION PRESENTED

Does a state's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of Section Two of the Twenty-first Amendment?

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## INTEREST OF THE *AMICI*

WineAmerica, Inc., the National Association of American Wineries ("WineAmerica"), appears on behalf of more than 800 member wineries from 48 states. WineAmerica represents the interests of American wineries and promotes the advancement of the wine industry.[1] WineAmerica opposes protectionist state laws, which prevent its members from selling their wine across the country.

The following *amici* are trade associations and other organizations representing the interests of wineries: Arizona Winegrowers Association, Association of Maryland Wineries, Coastal Wineries of Southeastern New England, Colorado Wine Industry Development Board, Connecticut Vineyard & Winery Association, Family Winemakers of California, Idaho Grape Growers and Wine Producers Commission, Illinois Grape Growers and Vintners Association, Indiana Winegrowers Guild, Iowa Wine Growers Association, Long Island (NY) Wine Council, Louisiana Winery Association, Massachusetts Winegrowers Association, Missouri Grape & Wine Program, Missouri Vintners Association, North Carolina Winegrowers Association, Oklahoma Grape Growers and Wine Makers Association, Oregon Winegrowers Association, Professional Winemakers Association of Arizona, Rocky Mountain (CO) Association of Vintners & Viticulturists, Seneca Lake (NY) Winery Association, Small Wineries of New York, South Dakota Specialty Producers Association, Vinifera Wine Growers Association, Virginia Wineries Association, Walla Walla Valley (WA) Wine Alliance, Washington Wine Institute, Winegrowers Association of Georgia, WineMichigan, Yadkin Valley (NC) Winegrowers Association.

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[1] In accord with this Court's Rule 37.6, *amici* state that no counsel for party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3, *amici* state that Petitioners and Respondents granted consent to the filing of this brief.

The following *amici* are trade associations and other organizations representing the interests of grape growers: Allied Grape Growers; California Association of Winegrape Growers; California Farm Bureau Federation; Connecticut Farm Bureau; Connecticut Farm Winery Development Council; Florida Grape Growers Association; Indiana Farm Bureau Inc.; Maryland Grape Growers Association; New York Farm Bureau, Inc.; North Carolina Grape Council; Virginia Farm Bureau Federation; Washington Association of Wine Grape Growers; Winegrape Growers of America.

The Coalition for Free Trade ("CFT") is a non-profit organization dedicated to promoting the right to ship wine directly to consumers throughout the United States. CFT's Board of Trustees is comprised largely of wineries, and the resolution of this matter will affect these wineries' businesses. CFT has a vital interest in preserving the free flow of American wine in interstate commerce.

## SUMMARY OF ARGUMENT

This Court has repeatedly acted to further the framers' original vision that the many states, while sovereign, should be united in a single national market, and has applied the dormant Commerce Clause to invalidate protectionist State laws discriminating against businesses in other states. Yet this vision of a more perfect Union remains unrealized for Americans who make and drink wine. Many states, including Michigan, prohibit wineries in other states from shipping their products directly to consumers; instead, they compel out-of-state wineries who wish to sell their wines to consumers to subject themselves to the whims of cartel-like distribution systems. Presenting wineries with daunting economic constraints, and distributors with little incentive to serve wineries' needs, these systems effectively prevent consumers in these states from buying most of the wine labels in this country. By contrast, these states typically

allow wineries within their borders to ship directly to consumers. In Michigan, the practical effects of this scheme limit access to the Michigan wine market to a small number of the largest wine producers and prevent Michigan residents from buying most of the different wines made in this country unless they visit the wineries where those wines are made.

The State of Michigan and other litigants argue that Section Two of the Twenty-first Amendment trumps the dormant Commerce Clause and gives Michigan and other states free rein to erect discriminatory barriers to out-of-state wineries. But this Court has ruled that the Twenty-first Amendment does not give States *carte blanche* to adopt protectionist measures. *See Bacchus Imports v. Dias*, 468 U.S. 263 (1984). Michigan's discriminatory barriers are clearly protectionist in nature and deprive most out-of-state wineries of their ability to sell wines to Michigan residents. Such discrimination cannot be justified by the states' legitimate interests under the Twenty-first Amendment.

In accord with the vision of the framers, this Court should affirm the Sixth Circuit and hold that Michigan's restrictions on direct shipping of wine to Michigan consumers by out-of-state wineries is unconstitutional.

## ARGUMENT

"The discovery of a wine is of greater moment than the discovery of a constellation. The universe is too full of stars."

—*Benjamin Franklin*

### I. AMERICA'S SMALL WINERIES MEET CONSUMERS' INCREASING PREFERENCES FOR A WIDE VARIETY OF DIFFERENT WINES.

#### A. Small Wineries Confront A Host Of Challenges In Bringing Wines To Market.

For multi-generational grape growers, family farmers, optimistic entrepreneurs, and even the occasional dilet-

tante, the business of running a winery is a labor of love for the rocky soil, the oaken barrel, and the tinted bottle. Making wine is not for the faint of heart, nor the soft of hand—it is a risky, backbreaking business that requires years of detailed planning and deferred gratification. On top of these physical and mental challenges, winemakers discover when it comes time to sell their produce that they must also overcome the obstacles of discriminatory state laws which exclude them from the market in many states.

The first challenge that would-be vintners face is monetary. On average, starting a winery requires two million dollars. Nor are there any immediate returns to cover loan payments, fund continuing expenses, hire labor, or roll out advertising. Long after the first harvest, their mixture of crushed grapes, sugar and yeast must ferment and age in barrels for up to several years. Accordingly, winemakers find it difficult to finance their businesses, where the first drop of profit will not arrive for years after the first bank payments are due.

The second challenge is to cultivate the grapes. Like any farmer, the winemaker faces a barrage of hazards: from animals and insects—such as gophers, glassy-winged sharpshooters (a fantastically named pest that can decimate entire vineyards), deer, and wild turkeys—to frost, drought, and other calamities. The grape farmer must also don the hat of a geologist to assess the soil to decide when and how to plant; adopt the mind of a botanist to choose when to sow and when to reap; and assume the clipboard of a manager to hire and supervise labor and negotiate with suppliers. Between August and October, the grapes must be harvested during the cool night in order to keep freshly picked grapes from fermenting prematurely before they can be crushed.

A third set of challenges comes with turning the grapes into wine. The winemaker again adopts the precision of a chemist, for the variables in fermenting grapes are legion, and any one of them could make the difference between an award-winning wine and plonk or *vin ordinaire*. Time, temperature, sugar content, the strain of yeast used, the composition of wood barrels—all of these factors are key to the end result, which the winemaker will not know for years to come. Small family wineries hoard their own trade secrets and traditional practices, yet are engines of innovation and paragons of quality.

After the grapes have fermented, the wine has aged and perfected, and finally has been bottled, a wine maker confronts yet another challenge—not animal or vegetable, but legal. Michigan, like other states with similar laws, forbids small wineries from shipping their wines directly to willing Michigan residents unless the winery is located within the state. Wineries on the wrong side of Michigan's borders instead must find a distributor willing and ready to sell their wines in the state—a task so demanding that only a handful of wineries succeed at it.

### B. The Number Of Small Wineries In America Has Grown Tremendously In Recent Years, Providing Consumers With A Great And Growing Variety Of Wines.

Despite the hurdles involved in starting a new winery, the wine industry in the United States has changed dramatically in recent years, with explosive growth in the numbers of small wineries across the country. Since 1980, the number of wineries has quadrupled, from 919 to 3,726 in 2004.[2] Most of this growth has been outside Califor-

[2] Except as noted, the figures in this paragraph and the next are derived from data received by WineAmerica from the Treasury Department, which issues permits required to operate wineries.

nia—there are now wineries in all 50 states, and more than half of the nation's wineries are in states other than California. For example, the number of wineries in Texas has jumped from 6 to 91 since 1980.[3] Texas is not alone: in that time, the number of wineries has soared all over the country, from Michigan (21 wineries in 1980 and 90 in 2004) and New York (from 69 to 203) to Washington (from 22 to 323), Oregon (from 36 to 228) and Pennsylvania (from 29 to 99). This new diversity of wineries offers connoisseurs and novices alike unprecedented opportunities to discover and appreciate the artistic skills of vintners from across the country.

The vast majority of wineries are small, farm-based, family-run enterprises. A typical winery occupies 20 acres and produces 4,000 cases of wine annually, either from its own fruit or fruit grown by local farmers. More than 70% of the nation's wineries produce fewer than 10,000 cases yearly, and more than 80% produce fewer than 25,000 cases—a quantity which can be sold entirely through on-site tasting rooms and by direct shipment to consumers via the Internet and other means.[4] Indeed, most wines are "hand sold" through direct contact between a person familiar with the wine (often a winery employee) and the buyer. Except for the largest producers, advertising is too expensive for wine-

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[3] In 1981, 6 Texas wineries produced 24,000 gallons of wine. Twenty years later, 46 Texas wineries produced 1,445,000 gallons of wine. *See Texas Wine and Wine Grape Industry Fact Sheet*, Texas Wine Marketing Research Institute, Sept. 2002, *available at* http://www.hs.ttu.edu/texaswine/PT_4071.pdf.

[4] Conversely, the data reflect that most of the wine consumed in this country is made by a relative handful of large producers. According to Treasury Department data, the 50 largest wineries are responsible for 87% of the wine sold, by volume. As discussed below, these wineries have little difficulty obtaining distributors.

makers. Instead, consumers most often find their wines through one-on-one contact—perhaps through the recommendation of a waiter, a wine-store proprietor, or a friend. Or customers may seek a specific wine because they have read about the wine or visited the winery.

Because personal connections are so important in the sale of wine, tourism is essential for smaller wineries, almost all of which have on-site tasting rooms and draw business from visitors. Through tasting rooms, consumers are exposed to the products of "craft" wineries. Guests sign registers and provide their addresses to receive subsequent mailings. Customers who have discovered and developed relationships with particular wineries often want to continue purchasing those wines, even if they live in or later move to another state. This can be difficult: the shelf space available in retail outlets is necessarily limited, and distributors favor those labels they can sell in large volumes. However, the Internet has made it easier for wine drinkers to obtain less common wines.[5]

Small wineries are important to the rural economy. A typical new family winery will provide regular employment for five to ten people, and will have annual sales of $200,000 to $1.5 million. Wineries also attract tourists, with the corresponding benefits to the areas where they are located.[6] In areas where wineries flourish, restaurants, bed-and-breakfasts, inns, retail boutiques and other farm and craft businesses also succeed. Employment associated

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[5] *See Possible Anticompetitive Barriers to E-Commerce: Wine*, A Report from the Staff of the Federal Trade Commission, July 2003, at 1 ("FTC Report"), *available at* http://www.ftc.gov/os/2003/07/winereport2.pdf.

[6] For every $3 a winery receives in gross revenue from all sources, tourists will add roughly $1 to the local economy. Bill Nelson & Cary Greene, *Components of a Model Winery Law*, Vineyard and Winery Management (Vol. 29, No. 3, May/June 2003).

with small wineries has transformed economically depressed rural communities, such as the Finger Lakes and Hudson Valley districts in New York, southern Oregon, and eastern Washington. To spur this sort of economic growth, Indiana—like other states—recently launched a "wine trail," a network of wineries within a short drive of each other:

> Organizers hope the trail lures more travelers to their stores, where tasting rooms can turn visitors on to unfamiliar wines.
>
> Jim Butler, owner of Butler Winery in Bloomington, said promoting lesser-known grapes can be a challenge for small wineries, many of which lack the money for extensive advertising. But wine trail organizers think they can pool their resources to promote not only the wine they make, but the industry itself.
>
> "People have an interest in trying new things, in new tastes," Butler said.[7]

As Mr. Butler suggested, the spread of wine trails reflects that American consumers have been discovering new wines. The growth in small wineries reflects the maturation of the wine industry and consumers' increasingly sophisticated tastes. While there are many wines to choose from at any price, the diversity of products is greatest at the high end of the market, in which small wineries are most competitive. Premium wine production is characterized by many boutique wineries crafting small lots of wines. By contrast, "value" market segments are dominat-

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[7] Jenny Montgomery, *Move over Napa*, Associated Press, July 17, 2004, *at* http://www.msnbc.msn.com/id/5158783.

ed by the larger producers.[8] As wine drinkers grow more sophisticated, they tend to turn to small labels: American wine drinkers increasingly prefer individualistic, handcrafted wines in lieu of commodity-type wines. One measure of consumers' increasing sophistication is the popularity of wine magazines such as *The Wine Spectator*, which reviews more than 10,000 wines each year. Wine tasting and reviewing involves many factors, objective and subjective, and wine reviews often read like an art critic's review of a symphonic performance or a painter's latest work.

Today there are more than 25,000 domestic wine labels, most of which are produced by small wineries. There is heightened interest in reserve wines (made from particular vineyard blocks where the soil produces better grapes), wines based on variations of winemaking technique (unfiltered, unfined, or carbonic maceration, for example), various blends (such as "Meritage"), and fruit wines. A typical winery may make ten to twenty different offerings from each vintage year. Vintners compete with one another by crafting wines that express the character and nature of the particular wine variety and style, as well as the vintner's own interpretation of the varietal ideal. Many consumers have strong opinions about every step in the production of a wine, from the region and location where the fruit is grown, to the variety of grapes used, to the planting of the vine and the harvest of the fruit, to the means of aging and

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[8] "Over two-thirds of the large wineries concentrate their business in the under $8 per bottle wine segment, while the small and mid-sized wineries are focused on the fastest-growing wines, over $8 per bottle." *Small wineries lead state's wine growth*, San Francisco Business Times, July 19, 2004, *available at* http://sanfrancisco.bizjournals.com/sanfrancisco/stories/2004/07/19/daily11.html. "Small and mid-size wineries . . . dominate[ ] high-end sales, selling 66 percent of all wine over $15 with a 71 percent revenue share." *Id.*

bottling of the wine. All of these factors affect the ultimate expression of the vintner's efforts, which is why wines made from the same variety of grape (say, a Cabernet Sauvignon) produced by a winery in one state will differ from a wine made from a similar line of grapes by a different winery in another state.

In the wine world, the word "*terroir*," a French term without an adequate English counterpart, has a special power, referring to the aromas and tastes specific to wines of a particular area. *Terroir* depends on the characteristics of a particular vineyard—the interaction of climate, sun exposure, grape variety, water, soil, and local winemaking techniques. A winery producing 10,000 cases annually usually requires fewer than 50 vineyard acres to grow its grapes. Somewhat larger wineries similarly craft wines from the grapes of a single vineyard. Because they attempt to capture something unique about a place, single-vineyard wines can only be made in limited quantities.

A fine wine is a blend of art and science, and *terroir* is only one aspect of what makes wines unique:

> The winemaker, and that includes the winegrower, can maximize or minimize the fruits of nature by his or her skill .... [N]eighboring winemakers can make totally different quality wine using virtually the same raw product and the same technology. Chemical analysis of the wines in question may be virtually indistinguishable, yet one wine will have all the definition, vitality, and expression of character that the other lacks. Why does this occur? No doubt there are valid reasons that science may one day establish, but in our current state of ignorance I can only say that it is always the winemakers with passion who are able to produce the finer, more characterful

> wines .... Some winemakers have even been known to sleep by their vats during a particularly difficult fermentation, so that they are on hand to make any adjustments immediately if anything goes wrong. From the grower who never hesitates to prune the vine for low yields, yet always agonizes over the optimum time to harvest, to the winemaker who literally nurses the wines through each and every stage of fermentation and maturation, who bottles at precisely the right time and at exactly the correct temperature, the human element is most seriously the joker in the pack when it comes to factors affecting the taste and quality of the wines produced.[9]

Small wineries possess the artistic creativity and the innovative spirit—as well as the economic flexibility—to satisfy this increasing consumer interest in wine variety.

The experience of Oregon reflects these changes in the industry and the tastes of American consumers. Oregon's climate had been seen as poor for grapes, but Oregon's wine industry has blossomed in the last three decades. In 1970, there were fewer than 100 acres of vineyards and only one winery in Oregon; 30 years later, there were 10,500 acres of vinifera vineyards, and now there are 228 wineries.[10] Now, "Oregon has a worldwide reputation for its excellent wines, and its wineries have become a tourist destination, bringing visitors from all over the world to appreciate the beauty and quality of Oregon wine coun-

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[9] Tom Stevenson, *The New Sotheby's Wine Encyclopedia* at 24 (DK Publishing Inc. 1997).

[10] Edward W. Hellman, *Oregon Viticulture* at 1 (Edward W. Hellman ed., Oregon State University Press 2003). Another individual familiar with the Oregon wine industry recalls half a dozen wineries in those days. The current figure is based on Treasury Department data.

try."[11] Paradoxically, Oregon's climate is "marginal" for growing vinifera grape varieties, but this produces grapes with superior flavor. "It is well established that winegrape varieties, when grown with just enough heat to ripen the fruit, retain their best flavors and varietal characteristics."[12]

Among wine connoisseurs, Oregon is particularly known for Pinot noir. "The wine world at large sat up and took notice in 1988, when Robert Drouhin, the prominent Burgundian negociant, started vineyards and a winery in the Red Hills of Dundee, declaring there were only two places in the world he would grow Pinot noir—Burgundy and Oregon."[13] These days, many people visit Oregon wineries and buy locally made wines, like top-quality Pinot noirs. Oregon wineries depend on direct sales of their wines through both their tasting rooms and by direct shipment. But, as we next discuss, these tourists cannot buy many Oregon wines once they return home.

## II. MANY STATES, LIKE MICHIGAN, DISCRIMINATE AGAINST OUT-OF-STATE WINERIES BY PROHIBITING DIRECT SHIPMENTS TO THEIR RESIDENTS.

A few wineries are large enough that they have contracts with distributors who sell their wines in other states, and those wines may be found in stores and restaurants across the country. But the typical winery does not offer enough

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[11] *Id.* at 1.

[12] *Id.* at 72.

[13] *Id.* at 2. Drouhin's arrival followed on the heels of a 1985 tasting at the International Wine Center in New York City at which an "august group of wine tasters was not able to distinguish Oregon Pinot noir from French Burgundy. And, not only was the number-one ranked wine from Oregon, all five of the top ranked wines were from Oregon." *See id.* at 3.

business to interest distributors and must sell its wines directly to consumers—or not at all. Many states bar out-of-state wineries from shipping directly to their residents, instead requiring them to sell to a distributor. As a practical matter, residents of such states cannot purchase most of the wines made in this country unless they visit the wineries.

### A. Many States Discriminate Against Out-Of-State Producers By Requiring Those Producers—But Not In-State Producers—To Sell Through The "Three Tier" System.

About half of the states in the Union ban the direct shipment of wine from out-of-state. Most state bans have their roots in legislation enacted soon after the Twenty-first Amendment ended Prohibition. At that time, state legislatures widely adopted a mandatory "three-tier" system of distribution, requiring producers to sell only through in-state licensed wholesalers. In turn, wholesalers supply retailers. In several states, direct shipment is a felony; in another twenty states, it is a misdemeanor.

Most states, including Michigan, permit their own wineries to ship directly to consumers within the state.[14] While state laws previously constrained the development of small wineries, states increasingly have exempted domestic wineries from the mandatory three-tier system, allowing them to sell wine either at tasting rooms, by telephone and the Internet to retail consumers, at wholesale to retailers and restaurants within their states, or to some combination thereof, and to ship wine directly to their in-state customers.

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[14] These include California, Washington, Oregon, New York, Ohio, Pennsylvania, Virginia, Texas, Michigan, Missouri, Illinois, Colorado, North Carolina and New Mexico, which together are home to 85% of the country's wineries.

Given the economic benefits associated with the growth of small wineries, it is easy to understand why state governments would want to promote the development of local rural wineries. Indeed, some of the rural areas which have benefited most from a burgeoning wine industry, like the Finger Lakes region of New York and the Leelanau Peninsula of Northern Michigan, are in states with protectionist regimes. Even in New York and Michigan, though, small wineries would benefit from reciprocal access to consumers in other states.

In states that do not exempt out-of-state direct shipments from the three-tier system, thousands of wineries across the country effectively are shut out of the market. Current circumstances fall far short of the national market envisioned by the framers. Under the influence of powerful wholesalers, many of the states with the greatest consumer demand remain essentially closed to direct shipments from out-of-state, including Florida (the second-largest market), New York (#3), New Jersey (#5), Massachusetts (#6), Michigan (#11) and Ohio (#12).[15] Wholesalers focus their marketing efforts on nationally branded products promising the largest profits and the easiest sales, which usually means representing the 50 or 100 largest wineries. As a result, very few of the 25,000 domestic wine labels are available to consumers in these states.

Exploiting states' authority to regulate alcohol, wholesalers with inordinate political power have used their clout to collect economic rents. Some state laws set excessively high barriers to wholesaler entry or provide franchise protection to distributors. This diminishes competition. In Florida, for example, to obtain and keep a wholesale license, a business must rent or own a warehouse, own outright an

[15] *Adams Wine Handbook 2004.*

inventory with a minimum cost of $100,000, and sell to at least 25% of the licensed vendors in the county.[16] In Georgia, the state requires that wholesalers be given exclusive authority to wholesale a brand, which can only be changed or terminated by a showing of cause, and with the approval of the state liquor commission. In Massachusetts, specific vehicles—instead of businesses—must be licensed to deliver shipments of alcohol, frustrating delivery by large companies such as UPS and FedEx.[17]

In recent years, wholesalers have worked vigorously to block direct shipping. Wholesalers and local producers have political clout with state legislators and regulators; of course, wineries located in other states do not.

### B. Without Direct Shipping, Out-Of-State Wineries And Consumers Cannot Do Business With Each Other.

A winery seeking access to consumers in a state barring direct shipment has only one real option—to obtain a wholesaler to distribute its products.[18] Most cannot do so,

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[16] In 1997, Florida made it a felony to ship wine directly to Florida consumers and restricted the issuance of wholesaler licenses. In a letter recommending veto of the legislation, Florida Attorney General Robert A. Butterworth characterized the measure as legislation allowing Florida's alcoholic beverage industry "to tighten its vise grip on the distribution of alcoholic beverages. . . . [A bill which] is the perfect tool for the vested interests who seek additional control over the marketplace, at the expense of competition and consumer choice. The legislation is anti-competitive, it is hostile to Florida consumers, and [it is] self-protective." May 19, 1997 letter from A.G. Robert A. Butterworth to Florida Governor Lawton Chiles.

[17] *See* FTC Report at 15.

[18] Ohio suggests that producers also can establish retail outlets, but for most wineries this would be prohibitively expensive. Brief of *amici* Ohio and other States in Support of Petitioners at 20.

and even those that do learn that the three-tier system serves them—and consumers—poorly.

**1. Most small wineries cannot get distributors to carry their wines.**

Small wineries are unlikely to find wholesalers willing to distribute their wines. Most fundamentally, this is because small wineries cannot offer distributors sales volume comparable to that of the largest winemakers. Even when they are willing to sacrifice a substantial proportion of their profit margin for the sake of getting their wines distributed to consumers, most American wineries rarely succeed in obtaining distributors.[19] By denying shelf space to small products that impose higher handling costs, the wholesaler creates more shelf space or bottle "faces" for products which turn over more quickly.

Given the considerable consolidation which has occurred among wholesalers and distributors in recent years, small wineries also face an increasingly narrow gauntlet of wholesalers. As the number of small wineries has exploded, the number of wholesalers has dwindled. For most other industries, the distribution system can be illustrated by an inverted funnel with a small number of suppliers at the narrow end, a greater number of distributors at the point where the funnel begins to open, and a still larger number of consumers at the base.[20] In contrast, wine's distribution system is shaped like an hour-glass, with many producers,

[19] Wholesalers recognize that this fact is inconvenient as a political matter, and have made gestures at addressing the problem. At the recent convention of the Wines & Spirits Wholesalers of America, a special booth was provided to assist small wineries seeking wholesalers. Though several members of WineAmerica attempted to take advantage of this assistance, not one was successful.

[20] FTC Report at 4.

many consumers, and only a few distributors between them. Wholesalers tend to focus almost exclusively on the well-known, high-volume wines to the exclusion of the smaller, lesser-known brands.[21] Concentration among distributors has not alleviated this problem and may exacerbate it.

And that is only part of the story. Wholesalers rarely generate retail demand for the products of small wineries. That responsibility also falls to the winery and also can be prohibitively expensive.

Having no access to wholesalers, wineries cannot meet the demand for their product from interested consumers who reside in states barring direct shipment. Popular wineries without national distribution are located across the nation in states as diverse as North Carolina, Georgia, Missouri, Texas, Washington, Virginia, Oregon, and New York. These wineries are major tourist attractions that individually welcome from 50,000 to 1,000,000 visitors per year from around the nation. Yet because of laws barring the direct shipment of wine in many states, including Michigan, these popular wineries cannot distribute their products in more than a handful of states.

**2. If a small winery does find a wholesaler, its difficulties are not over.**

Even for the rare small winery that succeeds in gaining the representation of a wholesaler, the hard fact is that the winery is likely to realize little or no profit from out-of-state sales. Wholesalers ordinarily do little in exchange for the high costs they charge small wineries. The cost of using a wholesaler is overwhelming from a small winery's perspective and saps its entire profit, or more. Yet the small

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[21] *Id.* at 45-59.

winery provides negligible income to the wholesaler, which has little incentive to market products which contribute only a small fraction of its total revenue.

Wholesalers are not motivated to aggressively market the products of small wineries, from whom they realize comparatively minimal gross profit. Moreover, because most wine is "hand sold," and because a wholesaler's sales personnel never comes into direct contact with the ultimate customer, the influence of wholesalers on the marketing of the sorts of wines produced by small wineries is dramatically limited. Not surprisingly, wineries that succeed in obtaining wholesalers often complain that the wholesaler fails to maintain contact with restaurants or wine shops after making an initial sales call. Some wineries learn that restaurants have stopped selling their wines because the wholesaler has told the restaurant the wine is unavailable even though the wholesaler actually has the wine in stock. As a result, wineries with wholesalers often find they must incur additional marketing expenses, further draining their narrow margins. For example, wineries must bear the costs of expensive marketing trips to build retailer interest. In *Swedenburg*, the costs to a winery of supporting a wholesaler's operation—exclusive of the wholesaler and retailer's mark-ups—were estimated at approximately $4.00/bottle if only 100 cases are sold, and $8.00/bottle if only 50 cases are sold.[22] Small wineries find that, as a practical matter, they must incur these costs for the wholesalers to sell their wines.

Of course the margins collected by wholesalers and retailers also take money from the wineries, preventing small wineries from recouping their investment. When wine is

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[22] Affidavit of Simon Siegl in Support of Swedenburg Plaintiffs' Motion for Summary Judgment at ¶¶ 15-17, A. 3537-3538.

sold through the three-tier system, the winery typically nets less than half of the retail price of a bottle of wine. Almost half of the margin is retained by the retailers and wholesalers. For a bottle of wine selling for $20.00 at retail, the retailer usually will collect about $6.50 and the wholesaler usually will collect about $3.00. After other selling expenses, a small winery will net less than $10.00 per bottle, from which the marketing costs described above must also be deducted. The ultimate net, from $2.00 to $6.00, is almost always less than the winery's cost of production. In contrast, where direct shipment is allowed, a winery selling $20.00 bottles of wine will receive a net of about $19.00 per bottle.[23]

Barred from directly shipping to states governed by the three-tier system, and effectively prevented from selling their wines through wholesalers, most American wineries are excluded from the market in states mandating the three-tier system. At the same time, many such states permit domestic producers to ship wine directly to their residents. While these protectionist regimes undoubtedly serve in-state distributors and producers, they stand in the way of the national market envisioned by the Constitution's drafters.

## III. THE DISCRIMINATORY STATE LAWS AT ISSUE HERE VIOLATE THE FUNDAMENTAL PRINCIPLES ANIMATING THE COMMERCE CLAUSE.

For almost two hundred years, this Court has applied the Commerce Clause to promote the development of a national market. As Justice Johnson observed: "If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial

[23] *See id.* Typically, wineries sell at the full retail price and collect an additional charge for shipping.

restraints." *Gibbons v. Ogden*, 22 U.S. 1, 290 (1824) (concurring opinion). The founders understood that the grant of power to Congress in the Commerce Clause "grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves."[24] As Justice Jackson famously wrote:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

*H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949).

To these ends, this Court has applied the dormant Commerce Clause to "prohibit[ ] economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988). "Thus, where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected. The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's borders." *Philadelphia v. New Jersey*, 437 U.S.

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[24] *See* James Madison, 4 *Letters and Other Writings of James Madison* 14-15 (J.B. Lippincott & Co. 1865) *available at* http://press-pubs.uchicago.edu/founders/documents/a1_8_3_commerces19.html.

617, 624 (1978) (citations omitted). "The Court has consistently found parochial legislation of this kind to be constitutionally invalid . . . ." *Id.* at 627 (describing cases in which "a presumably legitimate goal was sought to be achieved by the illegitimate means of isolating the State from the national economy").

If the founders were concerned about isolation and economic warfare that might take place in a nation without a Commerce Clause, the current patchwork of state wine regulations proves that their fears were prescient. Because the framers' vision of a seamless economic union is not a reality when it comes to interstate shipment of wine, states regularly engage in *de facto* reprisals against other states' protectionist wine laws. Just as Michigan has closed its market to direct shipping from Iowa, so Iowa—through its reciprocity laws—has closed its doors to Michigan wine. But for the Commerce Clause, one might expect all state trade laws to take the form of tit-for-tat reprisals and restrictions.

In applying the dormant Commerce Clause to void protectionist measures, this Court has looked past pretextual defenses. For example, the Court affirmed the entry of a permanent injunction barring the State of Arizona from requiring a cantaloupe grower to build new packing sheds in Arizona instead of shipping the fruit across the California border for packing, concluding that the threat to the reputation of other Arizona cantaloupe growers was incommensurate with the burdens of requiring the grower to go into the packing business. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145-46 (1970). As *Pike v. Bruce Church* reflects, this "Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere." *Id.* at 145.

There is no real dispute that the discriminatory measures adopted by Michigan and other states cannot survive a traditional Commerce Clause analysis. These measures constitute plain economic protectionism, burdening out-of-state wine producers and benefiting in-state distributors and producers.

## IV. THE TWENTY-FIRST AMENDMENT DOES NOT JUSTIFY DISCRIMINATION AGAINST OUT-OF-STATE WINERIES.

### A. Under This Court's Decision In *Bacchus*, Discrimination Must Implicate The Principles Underlying The Twenty-first Amendment.

Michigan, like other states that discriminate against out-of-state producers, tacitly acknowledges that its regulatory regime conflicts with two centuries of Commerce Clause jurisprudence, but argues nonetheless that the Twenty-first Amendment frees the states of traditional dormant Commerce Clause restraints.

To the contrary, this Court has rejected Michigan's construction of the Twenty-first Amendment, ruling instead that it must be considered in conjunction with other constitutional provisions. "Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964). Thus, in *Bacchus Imports v. Dias*, this Court explained that "one thing is certain: The central purpose of the [Twenty-first Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition." 468 U.S. at 276. Rather, under

*Bacchus*, the question is "whether the principles underlying the Twenty-first Amendment are sufficiently implicated . . . to outweigh the Commerce Clause principles that would otherwise be offended." *Id.* at 275.

### B. The Experience Of States That Permit Interstate Direct Shipping Demonstrates That Restrictive Shipment Laws Are Not Closely Related To The Purposes Of The Twenty-first Amendment.

Michigan and other states argue that the Twenty-first Amendment was intended to ensure that the states could collect tax revenue, and that states have a legitimate interest in preventing underage drinking.[25] But these goals are not furthered by the discrimination at issue here, as demonstrated by the experience of the states that do not impose discriminatory burdens on non-resident winemakers.

#### 1. Many states permit direct shipping from other states.

About half of the states, with 42% of the nation's population, allow some form of interstate direct shipment of wine to their residents.[26] Thirteen states permit the shipment of wine from other states directly to in-state consumers so long as the state of origin also permits direct shipment from the receiving state. In those states,[27] a consumer who is neither a minor nor visibly intoxicated may receive, typically, two cases of wine per month, for person-

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[25] Brief for the Petitioners at 19-20; Brief of *amici* Ohio and other States in Support of Petitioners at 22-24.

[26] Forty states, with 87% of the population, allow consumers to receive wine shipped from within the state.

[27] California, Colorado, Hawaii, Idaho, Illinois, Iowa, Minnesota, Missouri, New Mexico, Oregon, Washington, West Virginia and Wisconsin.

al use and not for resale. Ten other states require that out-of-state shippers obtain permits before shipping directly to consumers.[28] The so-called "shipper permit" legislation in effect in these states requires all shippers to be licensed by the state in which the consumer receives the wine. The state may collect a fee for the permit and may require the shipper to report regularly and pay taxes.

**2. States permitting direct shipping do not have problems collecting taxes.**

States which permit direct shipping have found means of satisfying other tax and regulatory goals. As the FTC Staff explained: "Several states that allow interstate direct shipping also collect taxes from those shipments. By requiring out-of-state suppliers to obtain permits, states such as New Hampshire have sought to achieve voluntary compliance with their tax laws. Most of these states report few, if any, problems with tax collection."[29] Indeed, WineAmerica supported new direct shipment legislation passed in Virginia, North Carolina and South Carolina requiring out-of-state wineries to obtain a permit and to collect and remit the appropriate sales and use and excise taxes for all wine shipped into those states. Wineries which obtain a permit agree, *inter alia*, to submit to the state's jurisdiction and to collect and remit taxes. Other states with reciprocity agreements forego taxing interstate direct shipments altogether."[30]

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[28] Georgia, Louisiana, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, South Carolina, Texas and Virginia.

[29] FTC Report at 4.

[30] *Id.* at 4.

Winemakers respect state concerns that out-of-state shippers will operate beyond the reach of state laws, and are willing to submit themselves to the regulations of the states to which they ship. Wineries have authored and subscribed to their own code of self-governance, the Wine Industry Code for Direct Shipping (the "Code"). Among other things, the Code (1) allows direct shipping only to locations where such shipping is legal and to persons who may legally consume wine; (2) requires all shipments to be conspicuously labeled so that carriers can deny delivery to unauthorized persons, such as minors; (3) provides that wineries generate reports to the authorities of the receiving state including their total shipping statistics and tax information; (4) mandates that wineries train their employees to appreciate the responsibilities of direct shipping. In addition, the wine industry has collaborated with the National Conference of State Legislators to create a Model Direct Shipping Bill ("MDSB"). The MDSB contains many of the Code's provisions. It also mandates the licensure of out-of-state wineries under the receiving state's laws, thereby establishing a zone of jurisdiction over participating wineries, and sets limitations on the quantity of wine to be sent to any one person. As instruments of self-regulation and cooperation with authorities, the Code and the MDSB demonstrate wineries' willingness to be regulated.

In any event, if a state were to decline to collect excise taxes through a permitting system, the foregone revenues would be minimal. Wine is a bulky, heavy product with high shipping costs. Direct shipment offers a significant price advantage only for fairly expensive wines (i.e., $20 per bottle and up), which constitute a small share of the overall market in table wine.[31] The volume of total wine

[31] FTC Report at 24-25.

sales dwarf direct shipments, given that so many nationally branded wines are readily available at lower cost and with greater convenience from a neighborhood store. In New Hampshire's experience, direct shipment has amounted to about one-third of one percent of the total market for table wine.[32] Even if the volume were half again as large, lost excise taxes in Michigan would be about $37,000 a year, and lost excise taxes in New York would be about $42,000.[33] Likewise, in comparison to the magnitude of other lost sales- and use-tax revenue, the portion attributable to the direct shipment of wine would be miniscule.[34]

In those states which have adopted liberal direct-shipping regimes, the wine industries have prospered, in part

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[32] New Hampshire has had a permit direct shipment program for over three years, currently with some 312 permittees. Interstate direct shipments into New Hampshire for the fiscal year ending in June 2004 approximated only 0.32% of table wine sales.

[33] In Michigan, total table wine sales in 2003 were reported to be about 14.5 million gallons. *Adams Wine Handbook 2004*. The Michigan excise tax on wine is $0.51 per gallon (10.2¢ per bottle or $1.21 per case). If 0.5% of total table-wine sales were directly shipped to consumers without the collection of any excise taxes, the lost revenue would approximate $37,050 per year. A similar analysis for New York shows a potential revenue loss from 0.5% of 44 million gallons at $0.19 per gallon approximating $41,800 dollars per year.

[34] Based on conservative assumptions (i.e., an estimate that direct sales would be 0.5% of total table wine sales, an average price of $20/bottle, and no collections through a permit system or use tax payments by state residents), lost sales and use taxes would amount to $581,000 yearly in Michigan and $1.4 million yearly in New York. To lend perspective, revenue losses in New York from all remote sales total about $1.35 billion yearly, and the corresponding figure in Michigan is about $600 million. Donald Bruce & William Fox, *State and Local Sales Tax Revenue Losses from E-Commerce: Updated Estimates*, Center for Business and Economic Research, Sept. 2001, *available at* http://cber.bus.utk.edu/ecomm/ecom0901.pdf.

because of the enhanced access to consumers in states with like regimes. This has been the experience of Oregon, which adopted its new regime in 1989. In turn, these economic benefits return more moneys to the state from other taxes and sources of revenue.

### 3. Discrimination against direct shipment from out-of-state wineries does not promote moderation or curb underage drinking.

Putative state interests in promoting moderation or curbing underage drinking cannot justify the erection of protectionist barriers against out-of-state producers. Discriminatory provisions like Michigan's have nothing to do with discouraging the consumption of wine by the general public or minors—at best, such provisions merely prompt consumers to purchase wines made in or shipped within Michigan.

Moreover, the contention that permitting direct shipment will encourage underage drinking is baseless. There is no credible evidence that the availability of direct shipment of wine poses a meaningful risk to minors seeking to obtain alcohol. Rather, the significant sources of alcohol to underage drinkers tend to be peers, adults, and commercial outlets. A.C. Wagenaar & T.L. Toomey, et al., *Sources of Alcohol for Underage Drinkers*, Journal of Studies on Alcohol, 57(3) 325-333 (1996). The report by the FTC staff found that "[t]he states that permit interstate direct shipping generally report few or no problems with shipments to minors."[35] Such states have found various ways to avoid such problems. "Some states have applied the same types of safeguards to online sales that already apply to brick-and-mortar retailers, such as requirements that package delivery

[35] FTC Report at 4.

companies obtain an adult signature at the time of delivery. Some states also have developed penalty and enforcement systems to provide incentives for both out-of-state suppliers and package delivery companies to comply with the law."[36]

### C. Consumers Benefit When Direct Shipping Is Permitted.

Wine consumers understand the benefits to them of direct shipping, and are concerned with restrictions on their ordinary rights to engage in interstate commerce. For example, Free the Grapes is a national grassroots coalition composed of wineries and over 300,000 consumer members.[37] This growing army of angry consumers has organized to fight the discrimination that prevents them from benefiting fully from the promises of a national marketplace. These citizens of Michigan, Ohio, Florida—indeed, all fifty states—are ready and willing to engage in otherwise legal and encouraged commercial transactions with the family winemaker.

The FTC staff confirmed what these consumers know, concluding "[a]fter extensive review, . . . that states . . . significantly enhance consumer welfare by allowing the direct shipment of wine to consumers."[38] The benefits to consumers include better selection of wine and cheaper prices. The FTC determined that direct shipment made wines available to consumers who otherwise would have virtually no access to them. "Consumers can purchase many wines online that are not available in nearby bricks-

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36 FTC Report at 4. *See generally id.* at 26-38 & App. B.

37 *See* Free the Grapes! *at* http://www.freethegrapes.org.

38 FTC Report at 3.

39 FTC Report at 3.

and-mortar stores."[39] A survey the FTC conducted in McLean, Virginia, determined that 15% of a sample of "highly popular" wines available online were not available from wine stores within ten miles.[40] For small wineries, whose offerings are not frequently purchased and may not be available at all, that statistic surely understates the problem. The FTC staff acknowledged as much, noting testimony that "unambiguously reveals that, by banning interstate direct shipments, states seriously limit consumers' access to thousands of labels from smaller wineries."[41]

In addition, the availability of direct shipping makes wine less expensive. The FTC staff concluded that "consumers can save money by purchasing online," particularly in the purchase of more expensive wines.[42] According to the McLean study, "if consumers use the least expensive shipping method, they could save an average of 8-13% on wines costing more than $20 per bottle, and an average of 20-21% on wines costing more than $40 per bottle."[43]

## CONCLUSION

There is great and growing demand for the products of America's small wineries, which are eager to meet it, but discriminatory laws in many states prevent most wineries from selling to willing consumers. These laws owe to the clout of distributors and the invisibility of non-resident wineries in state legislatures. For the public, these laws

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40 *Id.* at 3.

41 *Id.* at 3.

42 *Id.* at 3.

43 *Id.* at 3.

raise prices and decrease selection. For wineries, these laws Balkanize and erect barriers to the national market. Such laws limit the viability of many wineries across this country. The dormant Commerce Clause does not tolerate discriminatory burdens of this kind, and the Twenty-first Amendment does not excuse them. *Amici* urge this Honorable Court to affirm the decision of the United States Court of Appeals for the Sixth Circuit.

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IN THE

# Supreme Court of the United States

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JENNIFER M. GRANHOLM, Governor, *et al.*,
*Petitioners*,

v.

ELEANOR HEALD, *et al.*,
*Respondents*.

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JUANITA SWEDENBURG, *et al.*,
*Petitioners*,

v.

EDWARD D. KELLY, *et al.*,
*Respondents*.

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**On Writs of Certiorari to the United States Courts of Appeals for the Sixth and Second Circuits**

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# BRIEF FOR THE WINE AND SPIRITS WHOLESALERS OF AMERICA, NATIONAL ASSOCIATION OF BEVERAGE IMPORTERS, AMERICAN BEVERAGE LICENSEES, THE PRESIDENTS' FORUM OF THE BEVERAGE ALCOHOL INDUSTRY, AND THE ASSOCIATED FOOD DEALERS OF MICHIGAN AS *AMICI CURIAE* SUPPORTING PETITIONERS IN NOS. 03-1116 & 1120 AND RESPONDENTS IN NO. 03-1274

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## QUESTION PRESENTED

Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of Sec. 2 of the 21st Amendment?

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## INTEREST OF AMICI CURIAE

Wine and Spirits Wholesalers of America, Inc., founded in 1943, is a national trade organization representing more than 370 licensed wine and spirits wholesaler companies in 44 States, the District of Columbia, and Puerto Rico that hold state licenses to act as wine and/or spirits wholesalers. The National Association of Beverage Importers, Inc. is a national trade association that represents the interests of beer, wine, and spirits importers. American Beverage Licensees, Inc. is an association representing the interests of beer, wine, and spirits retailers. The Presidents' Forum of the Beverage Alcohol Industry is a trade association that provides a forum for members' chief executives to respond to issues affecting the beverage alcohol industry. The Associated Food Dealers of Michigan, Inc. provides services to businesses engaged in distribution of food and other products. *Amici* and their members play significant roles in the distribution of alcoholic beverages under state licensing systems. *Amici* thus have a direct interest in the proper resolution of these cases, which involve challenges to those longstanding systems.[1]

## STATEMENT

Like all States, Michigan and New York exercise strict control over the sale of alcohol within their borders. As part of their regulatory programs, each State restricts who may make retail sales to its citizens. Under Michigan law, "consumers must purchase alcoholic beverages from licensed retailers." Pet. App. (03-1116) at 5a. Licensed in-state winemakers are likewise permitted to sell at retail, although they may do so only with respect to their own products. *Id.* at 6a. Out-of-state retailers and wineries are not permitted to sell directly to Michigan consumers. *Id.* at 6a.

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[1] The parties have consented to the filing of this brief. No party authored this brief in whole or in part, and no person except *amici* and their members made a monetary contribution to the preparation or submission of this brief. *See* S. Ct. R. 37.6.

The New York retail system is similar in most, though not all, respects. New York law provides that no one may sell alcoholic beverages at retail "without obtaining the appropriate license . . . ." N.Y. Alco. Bev. Cont. Law § 100(1), quoted in Pet. App. (03-1274) at 6a. The law further provides that "[n]o alcoholic beverages shall be shipped into the state unless the same shall be consigned to a person duly licensed hereunder to traffic in alcoholic beverages . . . ," *id.* § 102(1)(c), quoted in Pet. App. (03-1274) at 6a, effectively barring direct sales to consumers by out-of-state vendors. Licensed wineries with an in-state physical presence may sell directly to consumers. *See* Pet. App. (03-1274) at 7a-8a. Wineries that do not meet that condition may not.

Plaintiffs challenged the regulatory systems in both States on the ground that, by prohibiting direct sales from unlicensed out-of-state wineries, the States impermissibly discriminated against interstate commerce. The Sixth Circuit upheld the challenge to Michigan's law, rejecting the idea "that a state's 'virtually complete control' [*see North Dakota v. United States*, 495 U.S. 423, 431 (1990) (plurality opinion) (internal quotation marks omitted)] over liquor regulation enables it to discriminate against out-of-state interests in favor of in-state interests." Pet. App. (03-1116) at 12a. The Second Circuit took a different view with respect to the New York law. After reviewing this Court's decisions addressing the interplay between the Commerce Clause and Section 2 of the Twenty-first Amendment, the court of appeals concluded that "New York's regulatory regime falls squarely within the ambit of Section 2's grant of authority." Pet. App. (03-1274) at 25a. The court found that the provisions limiting the privilege of direct selling to licensed in-state entities "serve[] valid regulatory interests," *id.* at 25a, "allow[ing] the state to monitor the distribution and sale of alcoholic beverages by permitting such distribution and sale only through state-licensed entities supervised by, and accountable to, the [State Liquor Authority]." *Id.* at 25a.

## SUMMARY OF ARGUMENT

The short answer to the question posed by this Court is no: the statutory scheme described in the question does not "violate the dormant Commerce Clause, in light of Sec. 2 of the 21st Amendment." Whatever may be the ultimate boundaries of state authority under the Twenty-first Amendment, that authority necessarily includes—as it has for more than seven decades—the power to limit retail sales of alcohol by out-of-state vendors that are not subject to the full extent of state regulatory and taxing powers. That conclusion controls these cases. Plaintiff out-of-state wineries are not subject to the same regulatory oversight as licensed in-state sellers, and, like other out-of-state retail liquor vendors, they have no overriding constitutional right, under the Commerce Clause or any other provision, to disregard state regulatory prohibitions on making direct sales to state citizens.

I. The theory advanced by the plaintiffs—that, if a State permits in-state vendors to sell alcohol directly to consumers, it must allow out-of-state vendors to do so as well—contradicts more than 70 years of regulatory history under the Twenty-first Amendment. During that period virtually every State has required alcohol to be sold pursuant to either a state-monopoly system or a state-licensing system, under which retail sales to consumers (that is, sales for off-premises consumption) are made by in-state vendors. Those systems were implemented after the end of Prohibition precisely to ensure that States would be able to exert the greatest possible control, both as a legal and a practical matter, over those who sold alcohol to their citizens. Given the chaotic conditions that had prevailed prior to ratification of the Twenty-first Amendment, it would be historically anomalous to conclude that States, under compulsion of the dormant Commerce Clause, have been obligated all along to allow vendors across the Nation to sell alcohol directly to consumers within their borders.

Although plaintiffs seek to portray state restrictions on out-of-state consumer sales (of which the laws now at issue are an example) as nothing more than rank favoritism, those restrictions in fact serve important state interests. To begin with, they allow state and local officials to impose necessary limits on the number of vendors licensed to sell alcoholic beverages within the State and to conduct meaningful investigations, with direct community input, regarding who those vendors will be. Furthermore, the licensed vendors' in-state locations, and the importance to them of maintaining their state-granted licenses, give the States much greater power to enforce their laws regarding illegal sales, particularly sales to minors. Finally, the restriction on sales by out-of-state vendors provides concrete assurance that those privileged to sell alcohol actually collect and remit the taxes that the laws impose. That assurance is of critical importance to the States, whose support for the Twenty-first Amendment was prompted in large part by a need for enhanced tax revenues. *See* L.V. Harrison & E. Laine, *After Repeal* 173 (1936).

Plaintiffs attempt to sidestep these state interests, arguing that "temperance" is the only legitimate interest served by the Twenty-first Amendment. Because the laws here *do* serve to inhibit sales of alcohol—especially illegal sales to underage drinkers—the argument is beside the point. But it is also incorrect. As the history of post-Prohibition regulation clearly demonstrates, Section 2 of the Twenty-first Amendment not only allowed States to ban liquor sales entirely, it enabled so-called "wet" States to blunt the harmful influence of unsupervised sellers by establishing strict local control over the sale of alcohol. *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 713 (1984) ("core § 2 power" is power "to *regulate* the sale or use of liquor within its borders") (emphasis added). Plaintiffs' alternative vision of a nationwide retail liquor market with thousands of vendors free to

sell directly to consumers—a vision that would sound the death knell of the longstanding liquor distribution system—is flatly inconsistent with that objective.

II. Despite plaintiffs' arguments to the contrary, the dormant Commerce Clause does not prevent States from instituting local control over alcohol sales. First of all, Congress has enacted the Webb-Kenyon Act, 27 U.S.C. §§ 121-22, which (in terms similar to the Twenty-first Amendment) grants broad authority to the States to limit the "shipment or transportation" of alcohol across their borders. That provision gives a federal imprimatur to state laws barring direct out-of-state liquor sales. Furthermore, Congress extended this authority at a time when it was well aware that States were seeking to control alcohol sales by restricting shipments from out-of-state vendors. Thus, even if the dormant Commerce Clause would otherwise cast doubt on the laws at issue here, Congress has effectively overridden its limitations with respect to this kind of state regulation. *See generally Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429-30 (1946) (Congress may narrow effect of dormant Commerce Clause).

In any event, the Twenty-first Amendment itself limits the effect of the dormant Commerce Clause in these circumstances. Although the Court has rejected the proposition that "the Twenty-first Amendment . . . somehow operated to 'repeal' the Commerce Clause [with respect to regulation of alcohol]," *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-32 (1964), it has continued to recognize that, consistent with the original understanding, "[t]he Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). That principle is sufficient to decide these cases. Here, Michigan and New York have promulgated laws that are directed to the most fundamental

aspect of any "liquor distribution system": who may sell alcohol directly to their citizens. In limiting the right of direct selling to in-state entities over whom the States can exercise the greatest possible oversight, the States are employing just the kind of regulatory authority that the Twenty-first Amendment is meant to protect. *See North Dakota v. United States*, 495 U.S. 423, 432 (1990) (plurality opinion); *see also id.* at 447 (Scalia, J., concurring in the judgment).

The decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984)—on which plaintiffs heavily rely—has little bearing on this particular question. That case involved neither importation nor transportation, the subjects to which the Twenty-first Amendment is principally addressed. Moreover, the State in that case defended its discriminatory law solely on the ground that, by providing a competitive advantage, it promoted local industry. While the Court found that particular interest to fall outside the scope of the Twenty-first Amendment, it specifically contrasted the greater deference that is given to "laws enacted to combat the perceived evils of an unrestricted traffic in liquor." *Id.* at 276. Here, the States are seeking to combat those evils, and the Commerce Clause does not bar them from doing so.

## ARGUMENT

### I. THE TWENTY-FIRST AMENDMENT AUTHORIZES STATES TO RESTRICT RETAIL SALES OF ALCOHOLIC BEVERAGES BY OUT-OF-STATE VENDORS

Section 2 of the Twenty-first Amendment declares that "[t]he transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. Am. XXI, § 2. That language, on its face, indicates that the States' power to control liquor traffic by restricting importation is far-reaching. Furthermore, while this Court has said that the

Twenty-first Amendment does not give States absolute authority over all matters pertaining to alcoholic beverages, *see, e.g., Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-32 (1964), it has repeatedly recognized that States may exercise extensive control over the physical distribution of liquor within their borders. *See, e.g., California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984). Thus, in *Midcal*, the Court observed that "[t]he Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." 445 U.S. at 110. Likewise, in *Capital Cities*, the Court noted that "[t]he States enjoy broad power under § 2 of the Twenty-first Amendment to regulate the importation and use of intoxicating liquor within their borders." 467 U.S. at 712.

The cases now before the Court fit squarely within those basic principles. What is at issue is simply the authority of States to control retail sales of alcohol—that is, sales for off-premises consumption—by limiting, or even banning, direct imports to consumers by out-of-state vendors. Numerous States have exercised that authority since the end of Prohibition, and it remains a significant part of most closely-regulated liquor distribution systems today. Although plaintiffs argue that, if a State permits in-state vendors to sell directly to consumers, it must allow the same for out-of-state vendors—a theory that would effectively put an end to the traditional liquor distribution system—the limitation on direct out-of-state sales continues to serve important state interests in controlling the sale of alcohol and in assuring effective tax collection. It thus advances legitimate goals that are consistent with, and protected by, the Twenty-first Amendment.[2]

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[2] In our view, it does not matter whether the Court, in deciding the constitutional question presented here, begins with analysis under the Commerce Clause or analysis under the Twenty-first Amendment. *See*

A. The idea that States may regulate liquor traffic by restricting sales from out-of-state vendors must be understood in historical context. After the tumult of the 1920s, the end of Prohibition brought with it the difficult problem of how to regulate the newly-allowed sale of alcohol. The conditions at the time were not promising: "[W]hat Prohibition did was to transfer the manufacture, sale, and distribution of liquor from legitimate to criminal forces." P. Johnson, *A History of the American People* (1999). Thus, "[i]n the early days after repeal of prohibition the nation was infested with bootleggers and racketeers anxious to continue their trade and willing to thwart the tax and health laws." *National Distributing Co., Inc. v. U.S. Treasury Dept.*, 626 F.2d 997, 1004 (D.C. Cir. 1980). *See Fedway Associates v. U.S. Treasury*, 976 F.2d 1416, 1418 (D.C. Cir. 1992) (noting congressional concern about "corruption of the newly-legal alcohol industry by bootleggers, racketeers, and other criminal types who had flourished during Prohibition.")

It fell primarily to the States, exercising their new constitutionally-recognized powers under the Twenty-first Amendment, to bring order out of this chaos. For the States, a principal goal was to get and maintain control over who could sell alcohol, and thereby to dictate to whom (and under what conditions) they could sell it. After experiencing the lawlessness of the Prohibition era, States wanted to establish laws that were aimed at controlling the excesses of liquor traffic and, perhaps just as important, to enact laws that were

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Pet. App. (03-1274) at 12a-14a. Because we believe that state laws within the scope of the Twenty-first Amendment do not violate the dormant Commerce Clause—either because the Amendment directly limits the dormant Commerce Clause or because, in any event, it "saves" certain alcohol laws from invalidation—the order of analysis seems immaterial. In the end, proper resolution of the issue turns upon whether the state laws in question are within the scope of the Twenty-first Amendment. As we discuss, the state laws here meet that standard.

enforceable. *See* R. B. Fosdick & A. L. Scott, *Toward Liquor Control* 149 (1933) (also known as the Rockefeller Report) ("[r]estrictive laws which cannot be enforced achieve success only on paper.") Furthermore, they sought to levy taxes on the sale of liquor, an ambition that had been one of the moving forces behind the repeal of Prohibition. *See* pages 17-18 *infra*.

In this environment, States saw a particular need for stringent regulation with respect to retail sales of liquor. *See Toward Liquor Control* 65 ("[v]irtually all the individual and social evils of the liquor traffic arise from an inadequately regulated and overstimulated retail sale.") In general, the States approached the problem of regulating sales to consumers in one of two ways. Following the recommendation of the influential Rockefeller Report, approximately 15 States elected to establish state monopolies over the retail sale of alcoholic beverages. In those States, "[t]he primary task of the [State Alcohol] Authority would be the establishment of a chain of its own retail stores for the sale of the heavier alcoholic beverages by package only." *Id.* 64-65. Some States, while generally following the monopoly model, provided for sales of specified products (often wine or beer) by state-licensed entities. *See* L. V. Harrison & E. Laine, *After Repeal* 110-11 (1936). By vesting control in the State itself, the monopoly system of retail distribution naturally tended to preclude direct sales to consumers by out-of-state liquor vendors.

The remaining non-dry States followed a second course—also recommended by the Rockefeller Report (but with misgivings that it would not be rigorous enough), *see Toward Liquor Control* 55-61—that focused, not upon state proprietorship, but upon strict regulation and licensing of private vendors. This system, then known as the licensing system, established a three-tier method of distribution. Under that system, producers were required to sell to licensed whole-

salers, who sold in turn to licensed retailers. *See generally McKesson Corp. v. Division of Alcoholic Beverages*, 496 U.S. 18, 24 n.3 (1990) (describing three-tier system in Florida). Under this type of system, the States closely monitored both wholesalers and retailers, and only licensed retailers were permitted to sell to consumers for off-premises consumption.

The licensing system, again, did not contemplate direct interstate sales to state consumers. To the contrary, it was founded on principles of tight state, and often local, control. In particular, States and local governments sought to exert control with regard to the physical locations at which liquor would be available. Thus, for example, the authors of the Rockefeller Report stated that "[s]uitable restrictions should be established by the license law or by administrative regulation with respect to the number and character of *places* where liquor may be sold." *Toward Liquor Control* 44. The authors further recommended that "[l]icenses issued for the retail sale of liquor should run not only to the person who sells, but to the *premises* where the liquor is sold," *id.* 49, thereby making revocation of the seller's license a more powerful enforcement tool. The licensing States generally followed this regulatory blueprint. *See* B. Bernard, *Liquor Laws* 26 (1949) ("[a] license to sell alcoholic beverages" provides authority to sell alcohol "in the premises set forth by address or other description.")

The importance of local control was reinforced in many licensing States by a further restriction: that retail licenses would be issued only to residents of the State or to corporations with resident officers or shareholders. *See Liquor Laws* 25-26; *see also* Note, *Economic Localism in State Alcoholic Beverage Laws—Experience Under the Twenty-First Amendment*, 72 Harv. L. Rev. 1145, 1148 (1959). Indeed, in some places, state laws required residence in the county or town where the retail business was located. *See*

*Liquor Laws* 25-26. These laws plainly assisted authorities in evaluating the qualifications of licensees, providing a greater likelihood that applicants would be known to the community in which they sought to operate. *See After Repeal* 74-75 ("[t]wo processes are involved in determining the propriety of issuing licenses, the investigation of applicants and of the premises for which the licenses are requested, and the obtaining of community sentiment toward proposed liquor businesses.") Although it is not clear whether the residence qualification was necessary to other regulatory objectives—given the extensive regulatory control already available over the licensee and the premises themselves—it was accepted as a common feature of post-repeal regulatory schemes. Indeed, in an early case before this Court, its constitutionality was regarded as a given. *See Premier-Pabst Sales Co. v. Grosscup*, 298 U.S. 226 (1936) (discussed at page 22 *infra*).

Finally, the States bolstered local control by imposing direct bans on retail shipments from out-of-state vendors. *See* Shankar, *Alcohol Direct Shipment Laws, The Commerce Clause, and the Twenty-First Amendment*, 85 Va. L. Rev. 353, 356 (1999) ("States . . . passed direct shipment laws to protect the three-tier system, which otherwise could be bypassed by interstate shipment of alcohol from producers directly to consumers.") These laws did not prevent all importation of out-of-state products, but rather required that the products be distributed through the three-tier system. *See id.* at 355. In those States, the three-tier system thus served several related regulatory purposes. Not only did it protect against the notorious "tied house" between producer and retailer—*see Toward Liquor Control* 43 ("[t]he 'tied house' system had all the vices of absentee ownership. The manufacturer knew nothing and cared nothing about the community.")—but it assured that direct sales to consumers would be made by licensed local merchants.

Following the end of Prohibition, therefore, it was widely understood that retail sales of liquor, far from being part of a wide-open national marketplace, instead were subject to strict state and local control. *See generally Carter v. Virginia*, 321 U.S. 131, 138 (1944) (Black, J., concurring) ("local, not national, regulation of the liquor traffic is now the general constitutional policy.") After ratification of the Twenty-first Amendment, the States took steps to assure that, if the State was not itself the direct seller of liquor, it was at least in a position to exercise the greatest possible authority over the direct seller. No one expected that outlets in California or Illinois would be free to sell liquor directly to consumers in Michigan or New York. To the contrary, that kind of unrestrained distribution scheme, with thousands of potential sellers scattered about the Nation, was precisely what the States were seeking to foreclose.

While contemporaneous practice does not conclusively establish constitutionality, the historical evidence at least demonstrates that those enacting alcohol laws after ratification of the Twenty-first Amendment regarded limitations on retail sales by out-of-state vendors as entirely natural and legitimate under its terms. *See Alcohol Direct Shipment Laws*, at 355 (noting that laws against direct shipment have existed "in many states since the repeal of Prohibition.") Indeed, if the Twenty-first Amendment had not countenanced such restrictions, the regulatory systems of most States would have immediately been constitutionally suspect—under plaintiffs' theory of compulsory equal treatment for out-of-state retail sellers—even though they were designed to serve well-recognized, and widely heralded, regulatory goals. That is an implausible conclusion. In their efforts to clean up the liquor traffic, the States were entitled to limit direct sales by out-of-state vendors precisely because their location outside the particular regulating State made them less susceptible to the reach of that State's power.

That principle applies with full force to the laws challenged here. Although plaintiffs try to limit the focus of these cases to sales of wine alone, the distinction that they attack—between direct sales by in-state wine producers (allowed) and direct sales by out-of-state wine producers (prohibited)—is, at bottom, nothing more than an example of the larger distinction made between in-state and out-of-state retail sellers generally. Like other in-state retailers, licensed in-state wine producers are, by virtue of their situs, subject to the complete regulatory and taxing authority of their home States. By contrast, like other out-of-state retailers, out-of-state wine producers tend to operate largely beyond the authority of the individual States in which they now seek to retail their products. That difference, in our view, is decisive. Under the Twenty-first Amendment, a State seeking to control the liquor traffic within its borders need not allow retail sales by out-of-state dealers over whom it has less than full regulatory authority.[3]

B. The Commerce Clause, of course, generally discourages lines drawn between in-state and out-of-state businesses. *See, e.g., C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994). But that rule has a diminished effect where regulation of liquor distribution is in question. *See Craig v. Boren*, 429 U.S. 190, 206 (1976) ("Twenty-first Amendment primarily created an exception to the normal operation of the Commerce Clause."); *see also* pages 21-29 *infra* (discussing effect of Twenty-first Amendment on dormant Commerce Clause). Although the dormant Commerce Clause still prohibits certain forms of pure "economic protectionism," *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984), it

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[3] We note that any attempt by plaintiffs to fashion a wine-specific constitutional rule would run head-long into the language of the Twenty-first Amendment, which explicitly refers to "intoxicating liquors" without making any distinctions. *See also* 27 U.S.C. § 122 (Webb-Kenyon Act) ("vinous . . . or other intoxicating liquor of any kind.")

necessarily accommodates state regulations that are designed to promote legitimate interests protected by the Twenty-first Amendment. Limitations on out-of-state retail sales directly serve those interests.

1. To begin with, the capacity to limit direct out-of-state sales allows States to exercise the greatest possible influence over the lawful sale of liquor to their citizens. Most immediately, it gives a State the threshold power to determine how many retail liquor sellers there will be. No State allows everyone who wants to sell liquor to do so: rather, in most States, licenses have long been rationed in accordance with population and local preferences. *See After Repeal* 50; *Liquor Laws* 15-17. Although the laws and practices vary among different States, it is common for States to allow local communities to have a say (or even a veto) about the grant or renewal of licenses in their vicinity. As a result, both state and local governments are able to prevent the unrestrained proliferation of retail outlets. By contrast, if States had to allow retail sales by any and all liquor vendors nationwide—as plaintiffs insist—the benefits gained by limiting the number of liquor licenses would necessarily be lost.[4]

The States also have an important interest in knowing as much as possible about who will be selling alcohol to their citizens. A central part of the traditional licensing system has always involved a detailed investigation into the qualifications and character of persons entitled to sell liquor in a

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[4] Although States theoretically could impose limits by apportioning licenses between in-state and out-of-state businesses, that solution would only make matters worse. Given the vastly greater number of potential out-of-state sellers, any proportional system (*i.e.*, any system that did not "favor" local applicants) would be severely weighted towards out-of-state sellers, undermining state efforts to impose enforceable restrictions on their licensees. It would also reduce dramatically the incidence of face-to-face transactions between buyers and sellers, thus interfering with enforcement of laws against prohibited sales.

particular community. Indeed, early observers of state regulatory systems remarked that "retail licensing" was "the most important field of licensing activity." *After Repeal* 52. Thus, for example, notices are typically posted *on site* whenever a retail seller seeks to obtain, renew, or transfer a retail liquor license, permitting those in the surrounding community to voice concerns about issuance of the license generally or about the prospective licensee in particular. To compel a State to review and investigate applications from all willing sellers everywhere—or to rely on investigations by other States applying their own criteria—would impose a significant, and undesirable, reworking of the present locally-based system. *See* Pet. App. (03-1274) at 28a.

The local licensing system not only addresses who may sell liquor, it also leads to better control over who may buy it. After Prohibition, experts took the view that "[w]hen liquor licenses are placed in the hands of trustworthy and competent persons the likelihood of subsequent liquor troubles is greatly reduced." *After Repeal* 74. In particular, the selection of licensees is part of the process for seeing that state laws barring sales to minors and the intoxicated are observed. From the ratification of the Twenty-first Amendment to the present day, all States have had laws prohibiting sales to minors. *See U.S. Dept. of Commerce, State Liquor Legislation* 156-63 (1941); *Liquor Laws* 59. Virtually all States have restrictions on sales to intoxicated persons as well. *See State Liquor Legislation* 156-63.

Proper enforcement of these laws, though concededly challenging, remains a state interest of the highest importance. But that enforcement necessarily begins with the expectation that sellers will refuse to sell to those who are not permitted to buy. To back up that expectation, States must wield (and use) the threat that state-issued licenses will be suspended or revoked for noncompliance. *See After Repeal* 215 ("[r]evocation is the only reliable complete remedy for

violations . . . .") Thus, if in-state sellers violate the State's alcohol control laws, they face the loss of their right to sell and, often, of their businesses: for example, in-state wineries would, at a minimum, forfeit their opportunity to sell directly to consumers. The stakes of noncompliance would be very different, however, for national retailers. National retail vendors, doing business across a wide spectrum of States, would have the capacity to spread, and thus minimize, the risk of disregarding state laws. As a result, even if nationwide vendors could be compelled to get licenses for each State in which they sold (a point that is by no means certain), the potential loss of any single state license, and the inability to sell directly in that State alone, would be relatively unimportant.

Finally, as both a practical and legal matter, in-state sellers are subject to far greater ongoing administrative oversight. *See* Pet. App. (03-1274) at 25a ("[p]resence ensures accountability.") By the very fact that licensees are physically located in the regulating State, enforcement officials can more readily investigate, through direct observation, whether they are conforming to the requirements of state law. *See generally Duckworth v. Arkansas*, 314 U.S. 390, 396 (1941) (noting "peculiar difficulties of controlling [intoxicating liquor]").[5] In addition, state laws call for licensed sellers to keep detailed records on site, which are subject to review by state regulatory officials. By contrast, if State enforcement officials were forced to monitor and inspect a myriad of sellers in all other States, that administrative exercise, even if legally permissible, would be both highly impractical and needlessly costly. *See* Pet. App. (03-1274) at 28a.

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[5] Even without nationwide retail sales of alcoholic beverages, Congress has recognized the difficulties that States face in seeking to enforce their liquor laws against out-of-state entities. *See* The Twenty-first Amendment Enforcement Act, 27 U.S.C. § 122a (providing federal jurisdiction for suits by state attorneys general).

2. The limitation of out-of-state retail sales is also important to another critical objective of alcohol control laws: effective tax collection. Indeed, while plaintiff wineries apparently suggest that they would be willing to collect and remit applicable taxes, they can hardly speak for all liquor vendors across the Nation, many of whom would presumably try to gain a competitive advantage by skirting state tax systems. As the Seventh Circuit has observed, "states have insuperable problems collecting their use taxes when people buy from out-of-state vendors that do not collect sales taxes." *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 850 (7th Cir. 2000). Thus, even if the States may constitutionally impose their alcohol taxes on sales by out-of-state retailers, *but see Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), the practical difficulties of enforcement would be enormous.

Advocates of nationwide sales thus choose a different tack, arguing that the problem of tax collection exists with respect to all direct out-of-state sales, not just sales of alcohol. *See, e.g., Alcohol Direct Shipment Laws*, 85 Va. L. Rev. at 358. Their point appears to be that the Court should not give weight to a concern about collection of state alcohol taxes because that concern, taken to its logical conclusion, would allow States to restrict direct out-of-state sales of *any* product. *See id.* But the history of the Twenty-first Amendment is again relevant here. For taxes on alcohol are not just another kind of fungible tax on goods. Rather than being an incidental by-product of the end of Prohibition, alcohol taxes were, in themselves, an important *reason for* the end of Prohibition. Put another way, the imposition of state alcohol taxes was part of the *quid pro quo* that led to enactment and ratification of the Twenty-first Amendment in the first place.

The history itself is well-recognized. As early commentators noted, "[t]he repeal of prohibition was brought about as much by the need for revenue as by the desire to eradicate the evils that grew out of that social experiment." *After Repeal*

173; *see also id.* (advocates of repeal found motivation in a desire to "[t]urn the bootlegger's profits into public revenues"); E. Behr, *Prohibition: Thirteen Years That Changed America* 232-33 (1996). But that goal can only be served, of course, if States are actually able to collect the taxes; to obtain the revenues that they looked for, States must have the right to impose rational conditions to assure proper payment. Thus, once it is recognized that the end of Prohibition was partly set in motion by a need for alcohol taxes, it is plainly counter-historical for liquor sellers to claim that the Constitution denies the States the means of most effectively obtaining them. That theory ultimately devalues one side of the expected bargain, allowing sellers, but not States, the full benefits of repeal. *See* Pet. App. (03-1274) at 28a (noting "burden" of attempting to assure compliance with tax laws).

It is also clear that effective tax collection is important, not just as an end in itself, but as a means of repressing alcohol consumption within the State. While the overall impact is debated, it is clear, at the very least, that States have *intended* alcohol taxes to depress consumption, even as they deal with the concern that excessive taxation would cause consumers to seek out illegal sellers. Reiter, *Citizens or Sinners? The Economic and Political Inequity of 'Sin Taxes' on Tobacco and Alcohol Products*, 29 Colum. J. of Law & Soc. Prob. 443, 449 (1996). Moreover, the revenues from alcohol taxes, taken along with license fees, fund enforcement of the state liquor laws, and support programs that assist state citizens suffering from alcohol-related illnesses. If those revenues are diminished by lack of collection, it follows either that state alcohol programs must be scaled back (at a time when, under plaintiffs' proposed nationwide distribution system, the difficulties of enforcement will be vastly increased), or that funds must be siphoned away from other competing state programs. The restriction of out-of-state retail sales avoids these unpalatable and unnecessary choices, assuring that local

licensees—holding seizable assets within the taxing jurisdiction—are responsible for collecting and remitting the taxes that the laws impose.

3. Largely disregarding these state interests, plaintiffs suggest that the only legitimate goal served by the Twenty-first Amendment is "temperance." But that suggestion, even if correct, would not help them in these cases. Whatever may be said about other kinds of state restrictions, the provisions limiting sales by out-of-state sellers *do* promote temperance. As we have discussed, the traditional licensing scheme necessarily leads to sales made by local retail sellers concerned about the threat of license revocation and other severe sanctions, increasing the likelihood that they will deny sales to those persons—in particular, to minors—for whom liquor is inappropriate. That is an advancement of temperance in a most specific and critical sense. And, insofar as taxes (if collected) reduce consumption, the more general interest in temperance is advanced as well.

In any event, the idea that temperance is the only real goal of the Twenty-first Amendment rests upon a misreading of the historical record. Quite apart from the importance of tax revenues to its ratification, it is plain that the drafters and ratifiers of the Twenty-first Amendment did not envision anything approaching an open market in liquor, limited only by laws specifically intended to shelter "dry" States. Quite the opposite: as we have discussed, the focus of alcohol-related efforts following repeal of Prohibition was upon identifying and implementing effective forms of state *regulation*. *See Capital Cities Cable*, 467 U.S. at 713 ("core § 2 power" is power "to regulate the sale or use of liquor within its borders.") What the States sought to do—and what the Twenty-first Amendment permitted them to do—was to impose much tighter means of control that would provide for sales of alcohol but avoid the distribution problems of the past. The systems that they chose, including restrictions on direct out-of-state

sales, were designed to meet that goal. While plaintiffs now seek to replace those traditional systems—substituting a broad national marketplace in which out-of-state liquor sellers enjoy full benefits without being subject to full oversight—that view of liquor sales is very different from the one embodied in the Twenty-first Amendment.

## II. THE DORMANT COMMERCE CLAUSE DOES NOT BAR STATES FROM RESTRICTING RETAIL SALES BY OUT-OF-STATE VENDORS

A. For several reasons, the dormant Commerce Clause does not prevent States from serving their legitimate interests in controlling alcohol distribution by limiting out-of-state retail sales. First of all, it is well-established that Congress may authorize state actions that the dormant Commerce Clause would foreclose. *See Quill Corp.*, 504 U.S. at 305; *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429-30 (1946). The Webb-Kenyon Act, by its express terms, does just that. In language similar to that of the Twenty-first Amendment, the Act prohibits "[t]he shipment or transportation . . . of any . . . intoxicating liquor of any kind, from one State . . . into any other State . . . in violation of any law of such State . . . ." 27 U.S.C. § 122. That provision gives state laws restricting "[t]he shipment or transportation" of liquor the weight of explicit federal approval, thus removing whatever check the dormant Commerce Clause might place on laws restricting sales to consumers by out-of-state vendors.

We will not repeat the arguments made on this point by the Michigan petitioners and New York respondents, which demonstrate that the Act does what it purports to do. We note only that Congress chose to reenact the Webb-Kenyon Act at a time—1935—when it was well aware that States, under both the monopoly and three-tier licensing models, would typically be providing for retail sales only by State-controlled entities or by licensed vendors subject to comprehensive state

oversight. (As we have noted, those were the alternative systems proposed by the well-known Rockefeller Report.) It seems highly improbable, therefore, that Congress, in affirmatively prohibiting shipments of alcohol in violation of state law, somehow meant to allow free passage to retail shipments that would have fallen afoul of virtually every state regulatory system at the time. The more sensible reading of the Act is that it intended to permit States to regulate the heretofore untrammeled traffic in liquor by doing precisely what they were doing: restricting the privilege of direct selling to the State itself or to those under its full control.

B. In any event, the Twenty-first Amendment itself authorizes the laws at issue here. By its plain language, the Amendment focuses on two activities— "transportation" and "importation" for delivery or use—declaring either to be prohibited if conducted "in violation of the laws" of any State. Under any normal construction of those words, the Amendment would appear to authorize a law that bars out-of-state sellers from directly importing their alcoholic products for delivery to consumers, and the States plainly thought that it did. *See* pages 9-13 *supra*. Without question, the Amendment has that effect with respect to laws barring *all* sales of liquor. It should have the same effect as applied to regulatory schemes aimed at exercising strict control over the conditions under which alcoholic beverages may be distributed and sold.

The early cases addressing the Twenty-first Amendment certainly saw no grounds for a narrow interpretation. Although the full vitality of those cases is open to question, *see* pages 23-26 *infra*, those cases do, at least, reflect a more or less contemporaneous interpretation of what the Amendment was intended to do. Thus, in *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936), the Court stated that "[t]he words used [in the Twenty-first Amendment] are apt to confer upon the state the power to forbid all importations which do not comply with the conditions which

it prescribes." *Id.* at 62. Shortly thereafter, the Court stated flatly: "Since the Twenty-first Amendment, . . . the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause . . . ." *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391, 394 (1939). *See also Mahoney v. Joseph Triner Corp.*, 304 U.S. 401, 403 (1938).

The initial cases from this Court thus were highly respectful of state regulatory authority under the Twenty-first Amendment. In addition, the Court indirectly acknowledged the important regulatory interest in having local control over alcohol distributors. In a case involving a suit brought by an out-of-state corporation, the Court dismissed a challenge to certain Pennsylvania licensing fees—which were substantially higher for distributors that sold imported beer—on the ground that the out-of-state plaintiff lacked standing to bring the suit. *See Premier-Pabst Sales Co. v. Grosscup*, 298 U.S. 226 (1936). Addressing the applicable state law, the Court noted that "no one may sell beer in Pennsylvania unless duly licensed; and no license may issue to a corporation unless all of its officers and directors, and fifty-one per cent of its stockholders, have been residents of the State for the period of at least two years prior to the application for a license." *Id.* at 227-28. The Court then observed that "*[t]he constitutional validity of that provision is conceded . . . .*" *Id.* at 228 (emphasis added). Because the Court accepted that the State could require in-state residence as a valid condition of granting a license, it followed automatically that an ineligible out-of-state business could not complain about how fees for that license were determined.[6]

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[6] We note that the constitutionality of "residence" requirements is not before the Court in these cases. Plaintiff wineries were denied the right to sell in Michigan and New York because they are not located in those States. *See* Pet. App. (03-1116) at 6a; Pet. App. (03-1274) at 25a. The cases thus do not involve a situation in which the location requirement is

Some years later, in *Heublein, Inc. v. South Carolina Tax Comm'n*, 409 U.S. 275 (1972), the Court likewise upheld a state law requiring an out-of-state liquor producer to have a substantial presence within the State. The Court did so even though it expressly recognized that the in-state presence "served none of [the producer's] business interests," *id.* at 277, and that it made the producer subject to a South Carolina tax that it otherwise could have avoided. Despite those adverse effects, the Court found that the requirement of a significant in-state presence was part of "a regulatory scheme that serves legitimate State purposes other than assuring that the State may tax the firm's income . . . ." *Id.* at 282. *See also Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 139 (1939) (approving state policy of "limiting [liquor] traffic in order to minimize well-known evils, and secure payment of revenue.")

It is true, of course, that the Court has since cast doubt on the seemingly absolute language of its early decisions. Thus, it is no longer possible to claim, if it ever was, that "the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause [with respect to regulation of alcohol]." *Hostetter*, 377 U.S. at 331-32 (rejecting that view). But our position here does not depend on that kind of expansive reading of the Twenty-first Amendment. Rather, it rests on the much more basic notion that the Twenty-first Amendment, at its core, permits the States to exercise strict control over how, and where, liquor is distributed to their citizens. That is, under the Amendment, a State may constitutionally impose restrictions on importation that rationally advance its interests in protecting against uncontrolled distribution and in safeguarding its claim to important revenues.

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satisfied but a right to sell is nonetheless denied on the ground of lack of citizenship.

That more limited principle, far from being eroded by decisions of this Court, has received repeated approval. While recent cases have struck down state laws that interfere with congressional power under the Commerce Clause, or that are incompatible with principles of other constitutional amendments, or that violate the dormant Commerce Clause by imposing a discriminatory tax, *see* pages 26-29 *infra*, no case has repudiated, or even cast serious doubt upon, the States' authority to dictate how liquor is sold within their borders. Indeed, in addressing various other questions, the Court has made clear that the power to control distribution of liquor lies at the heart of the authority that the Twenty-first Amendment grants to the States. Thus, in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), the Court recognized that "the Twenty-first Amendment limits the effect of the dormant Commerce Clause on a State's regulatory power over the delivery or use of intoxicating beverages within its borders." *Id.* at 516. And, as we pointed out earlier, *see* page 7 *supra*, the Court in *Midcal* regarded the States as having "virtually complete control" over "how to structure the liquor distribution system." 445 U.S. at 110. *See also Capital Cities Cable*, 467 U.S. at 712.

Plaintiffs thus are only partly correct in asserting that the later cases of this Court have recognized an expanded role for the Commerce Clause and a less extensive role for the Twenty-first Amendment. While it is certainly true that the latter does not displace the former with respect to any and all matters involving treatment of alcohol—as it might have done in the *Young's Market* era—that does not mean that the Twenty-first Amendment takes a back seat with respect to laws within its legitimate scope. To the contrary, where the right to control how liquor is sold is at issue, the Twenty-first Amendment continues to have decisive force.

The decision in *North Dakota v. United States*, 495 U.S. 423 (1990), makes this apparent. There, the Court upheld a North Dakota statute requiring out-of-state shippers to file monthly reports and to affix labels to liquor for sale in federal enclaves within the State. Citing the "virtually complete control" standard set forth in *Midcal*, the plurality found that "[i]n the interest of promoting temperance, ensuring orderly market conditions, and raising revenue, the State has established a comprehensive system for the distribution of liquor within its borders. That system is unquestionably legitimate." *Id.* at 432 (plurality opinion); *see id.* at 438-39 (noting "extensive system of statewide regulation that furthers legitimate interests in promoting temperance and controlling the distribution of liquor, in addition to raising revenue.") Concluding that the North Dakota regulations did not improperly single out the United States for unfavorable treatment, the plurality pointed out that under the State's three-tier system "[a]ll other liquor retailers are required to purchase from state-licensed wholesalers, who are legally bound to comply with the State's liquor distribution system." *Id.* at 439.

In a separate opinion, Justice Scalia, concurring in the judgment, addressed a question close to that presented here: whether North Dakota could require the United States to purchase its liquor from in-state wholesalers rather than from out-of-state suppliers. His conclusion was that it could. Justice Scalia first noted that "[t]he Twenty-first Amendment . . . is binding on the Federal Government like everyone else . . . ." *Id.* at 447. He then stated flatly that the Amendment "empowers North Dakota to require that all liquor sold for use in the State *be purchased from a licensed in-state wholesaler*." *Id.* (emphasis added).

The reasoning of both those opinions is directly relevant here. Like the North Dakota laws, the Michigan and New York restrictions against out-of-state retail sales serve

legitimate state interests in "controlling the distribution of liquor" and "raising revenue." *See* 495 U.S. at 439 (plurality opinion). Furthermore, they stand on the same footing as the North Dakota requirement that all retailers purchase their liquor from "licensed in-state wholesaler[s]." *See id.* at 447 (Scalia, J., concurring in the judgment). If the Twenty-first Amendment empowers a State to require all retailers (including the Federal Government) to purchase liquor only from licensed in-state vendors, it seems evident that it would also empower a State to require that its own citizens purchase liquor only from licensed in-state vendors. Although one requirement applies at the wholesale level, the other at retail, they constitute interrelated parts of a comprehensive regulatory program aimed at exercising vigorous control over the sale of liquor.[7]

C. To counter the decision in *North Dakota*, plaintiffs rely heavily on *Bacchus Imports*, which struck down part of a state tax scheme on dormant Commerce Clause grounds. But, in *Bacchus*, the tax law in question—which exempted certain local alcoholic products from a general state tax—bore, at best, an attenuated connection to the act of importation, and none at all to transportation, the two activities to which the Twenty-first Amendment is primarily addressed. Morever, the State never contended (and, seemingly, could not have contended) that the tax was an integral part of a traditional regulatory system or that it served important state interests in controlling liquor traffic and raising needed revenue. Instead, the State justified the differential treatment

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[7] Although Justice Scalia, in his opinion, did not refer to the Commerce Clause, it is fair to assume that his conclusion regarding the in-state sale requirement takes it into account. Even apart from the unqualified nature of the statement that the Twenty-first Amendment "empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler" (495 U.S. at 447), the United States' option of complying with that requirement would be of no significance if it was invalid under the Commerce Clause.

solely on the ground that it promoted local industry. *See* 468 U.S. at 270-71. The Court found that particular explanation to fit poorly with the objectives safeguarded by the Twenty-first Amendment, saying that "[s]tate laws that constitute mere economic protectionism are . . . not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor." *Id.* at 276.

The laws at issue here, however, *are* designed to combat the evils of unrestricted liquor traffic. Like most States—whether they have chosen to implement the monopoly system or the three-tier system—Michigan and New York impose strict regulations limiting who can sell alcohol and under what conditions they can do so. Faced with the prospect of sales by thousands of producers and resellers—most of whom are beyond the full regulatory authority of any given State—the States have elected to bring the sale of liquor as close to home as possible, limiting direct sales by out-of-state dealers. That goal, unlike "mere economic protectionism," is one properly recognized and protected by the Twenty-first Amendment. *See Milton S. Kronheim & Co. v. District of Columbia*, 91 F.3d 193, 203 (D.C. Cir. 1996) (upholding local liquor warehousing requirement on the ground that it served valid enforcement objectives.)

To be sure, a law specifically restricting sales by out-of-state entities will, by its very nature, tend to benefit in-state entities. But, contrary to what plaintiffs appear to believe, that is the beginning, not the end, of the relevant constitutional analysis. The critical question remains whether the law properly serves ends cognizable under the Twenty-first Amendment. If not, as was the case in *Bacchus*, the law cannot be "saved" by that Amendment. But if the law does serve legitimate ends, as it does here, it is not rendered invalid simply because, to serve those ends, its provisions must be directed towards out-of-state businesses. *See*

*generally Toomer v. Witsell*, 334 U.S. 385, 396 (1948) (under Privileges and Immunities Clause, States may favor their citizens "where there are perfectly valid independent reasons for it."); *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 298 (1998) (applying *Toomer* standard).

The other cases relied on by plaintiffs deserve only brief mention. For the most part, the cases involve conflicts between state laws regulating some aspect of the liquor trade and constitutional provisions other than the Commerce Clause. *See, e.g., 44 Liquormart, Inc., supra*; *Capital Cities Cable, supra*; *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982); *Craig v. Boren, supra*; *Hostetter, supra*. In resolving those conflicts, this Court has taken the unstartling position that, however broad the authority conferred by the Twenty-first Amendment, it does not permit States to regulate liquor traffic without regard to values embodied in other constitutional provisions like the First Amendment. As the Court observed in *Craig*, "[o]nce passing beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful." 429 U.S. at 206. The reverse is also true: given that their challenges are specifically grounded in the Commerce Clause, plaintiffs can find little support in decisions with respect to different constitutional provisions.

The remaining few cases, though they do at least involve the Commerce Clause, are scarcely more on point. To the extent that States have argued that the Twenty-first Amendment allows them to take actions affecting liquor pricing in other States, *see Healy v. The Beer Institute*, 491 U.S. 324 (1989); *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986), the Court has expressed an obvious reluctance to endorse the authority of one State to export its pricing structure to other States (who, of course, have their own regulatory powers under the Twenty-first Amendment). There is no such problem here:

nothing in the Michigan or New York laws "has the undeniable effect of controlling commercial activity occurring wholly outside the boundary of the State." *Healy*, 491 U.S. at 337. To the contrary, each State seeks only to exercise the fullest control over what happens *within* the State itself, protecting its ability to control distribution of alcohol against the prospect of unrestrained direct sales from outside its borders. And nothing in the Michigan or New York laws brings into question the power of the Federal Government to regulate interstate commerce with regard to alcoholic beverages, an issue that necessarily requires definition of the residual Commerce Clause power left to the Federal Government after ratification of the Twenty-first Amendment. *See, e.g., Midcal Aluminum, supra.* Indeed, to the extent that federal power is implicated here, it supports, in the form of the Webb-Kenyon Act, the proposition that in-state sales requirements are constitutionally permissible.

In short, plaintiffs are simply mistaken that, except for laws directly promoting temperance, the Commerce Clause requires an open national marketplace for retail sale of alcohol to consumers. To the contrary: the Twenty-first Amendment authorized the States, not just to prohibit or depress sales of alcohol, but to exercise strict control in order to combat the well-known problems of unregulated sales. Rather than being forced to deal with all potential liquor sellers nationwide, States have the authority to insist that sales to consumers be made only by those within the full reach of their regulatory and taxing powers. The regulations at issue here plainly are a legitimate exercise of that authority, and the Twenty-first Amendment assures their validity.

## CONCLUSION

The judgment of the Sixth Circuit in Nos. 03-1116 and 03-1120 should be reversed. The judgment of the Second Circuit in No. 03-1274 should be affirmed.

Respectfully submitted,

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